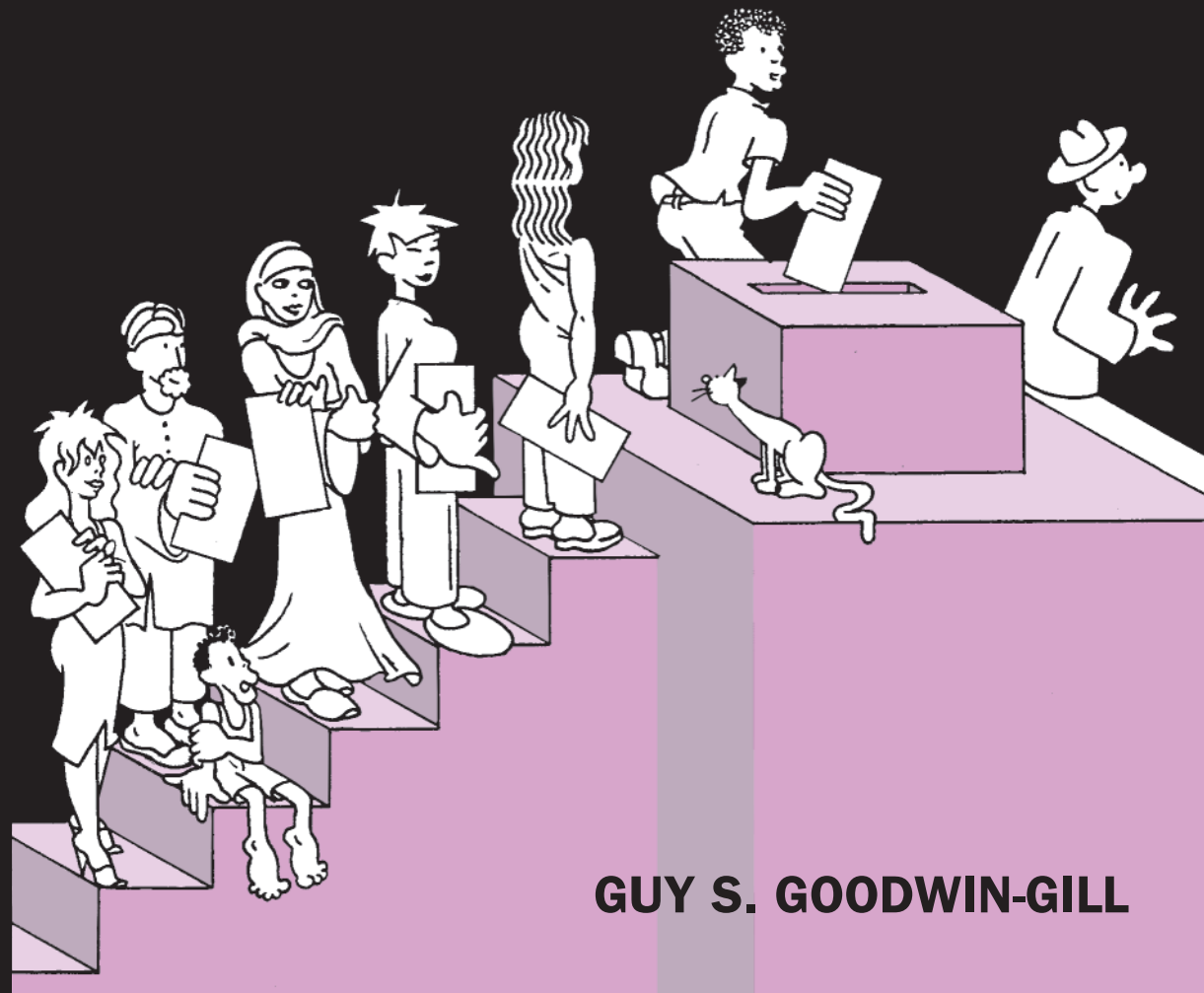


# FREE AND FAIR ELECTIONS

NEW EXPANDED EDITION

GUY S. GOODWIN-GILL FREE AND FAIR ELECTIONS



GUY S. GOODWIN-GILL

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2006

# Free and Fair Elections

New expanded edition

*Part 1: Further Steps along the Democracy Road  
and  
Part 2: The Development of International Law and Practice (1994)*

by

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Senior Research Fellow, All Souls College, Oxford

Inter-Parliamentary Union  
Geneva  
2006

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## FOREWORD

In 1994, when the IPU published its *Free and Fair Elections* study and adopted a Declaration on Criteria for Free and Fair Elections, few would have imagined the extent to which ‘freeness’ and ‘fairness’ would become universally recognized as the standard by which the quality of elections is to be judged.

The centrality of free and fair elections to democracy was subsequently reconfirmed by IPU Members in 1997 when they adopted the Universal Declaration on Democracy, stipulating that “The key element in the exercise of democracy is the holding of free and fair elections at regular intervals enabling the people’s will to be expressed”.

The first edition of *Free and Fair Elections* defined the constituent elements of a free and fair election with reference to the rules and standards of international law and State practice. The impact of the study, as well as the continuing relevance of the Declaration, was widely acknowledged by electoral experts at an International Round Table on Electoral Standards convened by the IPU in November 2004.

Yet the significant growth in the science and practice of elections since 1994, including an expansion in the field of actors, calls for an examination of recent developments in electoral standards. It is therefore right that the IPU should seek to make a further contribution to the understanding and the implementation of the concept of free and fair elections.

This second edition of *Free and Fair Elections* contains two distinct parts. The four entirely new chapters in Part 1 review developments in international law and practice since 1994 and make a general assessment of the influence of the IPU Declaration and study in the development and consolidation of legal norms. The final chapter of Part 1 sets out a number of issues that are emerging - or are likely to emerge - in the field of electoral standards. Accountability, participation and representation, including women’s representation, are among the issues that were identified at the International Round Table on Electoral Standards and are developed here. In Part 2, the full text of the 1994 study is republished with only minor corrections.

The IPU hopes that this new, expanded edition will continue to be of interest to all those involved in ensuring the quality of elections, including parliaments, election management bodies, electoral observers and election-related NGOs. It is hoped that it will also be a precious tool for scholars of international law and electoral systems.

I would like to thank most warmly the author, Guy Goodwin-Gill, for his willingness to return to the work begun in 1994 and for his comprehensive analysis of recent developments. My thanks also go to the participants in the International Round Table on Electoral Standards, and to the Ford Foundation for their generous and ongoing financial support to the IPU’s work on election standard setting.



Anders B. Johansson  
Secretary General — Inter-Parliamentary Union

## AUTHOR'S PREFACE

At the Conclusion of the 1994 Study on *Free and Fair Elections*, now Part 2 below, I argued that it was time to re-evaluate traditional conceptions of entitlement to represent the State, and that the manner by which the will of the people is translated into representative authority was now indeed a proper subject of international law.

Returning to prepare that Study for re-publication could only ever be a challenge, particularly when what was wanted was essentially a new introduction to a text which would otherwise be left unchanged. Few authors will every be one hundred per cent content with a text drafted ten or more years ago, if they were even then, for there is no necessary end to the process of revision. But the challenge proved exciting and illuminating. The November 2004 IPU Round Table provided both a sense of direction and some solid advice on emerging issues, and I am especially grateful for the constructive criticism which emerged. However, the approach to adopt to a new introduction was not immediately clear, and became so only through the analysis of so much that had happened in the meantime.

The review which now forms Part 1 of the present publication is by no means comprehensive, of course, and the complementary work of many of the IPU's traditional partners has not necessarily had the full attention which it deserves. Nevertheless, I have tried to single out particular streams of influence, action and concern, and to nail down at least a part of the future agenda.

Clearly, the issue of representation will be increasingly dominant in tomorrow's discourse, which will embrace not just free and fair elections, but also the very meaning of democracy at ground level, and of what it is in practice to have or to aspire to representative, democratic and accountable government, in a political and social context premised on justice, human rights and the rule of law.

It has been a great personal pleasure for me to continue to collaborate with the Inter-Parliamentary Union on these central issues. I have especially appreciated the strong support and encouragement of Anders B. Johnsson, the Secretary General of the IPU, whose personal commitment to truly democratic and representative institutions is a model for us all. His colleagues have been no less supportive of this project, and I am particularly grateful to Martin Chungong, for his help over the long term, to Julie Ballington, for her knowledge and comprehensive attention to gender issues, and to Andy Richardson, for guiding the project carefully and professionally to its conclusion. I would also like to thank Michael D. Boda, both for his contribution to the organization and content of the IPU Round Table, and for his comments during the drafting stage. Needless to say, the conclusions drawn and the opinions expressed are my own, as are any errors, omissions, or misjudgements.

Guy S. Goodwin-Gill  
All Souls College - Oxford  
December 2005

# DECLARATION ON CRITERIA FOR FREE AND FAIR ELECTIONS

Unanimously adopted by the Inter-Parliamentary Council  
at its 154<sup>th</sup> Session (Paris, 26 March 1994)

Of the Union's 129 Member Parliaments, 112 were represented at the Conference when this Declaration was adopted.

The Inter-Parliamentary Council,

*Reaffirming* the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights which establish that the authority to govern shall be based on the will of the people as expressed in periodic and genuine elections,

*Acknowledging and endorsing* the fundamental principles relating to periodic free and fair elections that have been recognized by States in universal and regional human rights instruments, including the right of everyone to take part in the government of his or her country directly or indirectly through freely chosen representatives, to vote in such elections by secret ballot, to have an equal opportunity to become a candidate for election, and to put forward his or her political views, individually or in association with others,

*Conscious* of the fact that each State has the sovereign right, in accordance with the will of its people, freely to choose and develop its own political, social, economic and cultural systems without interference by other States in strict conformity with the United Nations Charter,

*Wishing* to promote the establishment of democratic, pluralist systems of representative government throughout the world,

*Recognizing* that the establishment and strengthening of democratic processes and institutions is the common responsibility of governments, the electorate and organized political forces, that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of human rights and fundamental freedoms,

*Welcoming* the expanding role of the United Nations, the Inter-Parliamentary Union, regional organizations and parliamentary assemblies, and international and national non-governmental organizations in providing electoral assistance at the request of governments,

*Therefore adopts* the following Declaration on Free and fair Elections, and *urges* Governments and Parliaments throughout the world to be guided by the principles and standards set out therein:



## **1. Free and Fair Elections**

In any State the authority of the government can only derive from the will of the people as expressed in genuine, free and fair elections held at regular intervals on the basis of universal, equal and secret suffrage.

## **2. Voting and Elections Rights**

- (1) Every adult citizen has the right to vote in elections, on a non-discriminatory basis.
- (2) Every adult citizen has the right to access to an effective, impartial and non-discriminatory procedure for the registration of voters.
- (3) No eligible citizen shall be denied the right to vote or disqualified from registration as a voter, otherwise than in accordance with objectively verifiable criteria prescribed by law, and provided that such measures are consistent with the State's obligations under international law.
- (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.
- (5) Every voter has the right to equal and effective access to a polling station in order to exercise his or her right to vote.
- (6) Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others.
- (7) The right to vote in secret is absolute and shall not be restricted in any manner whatsoever.

## **3. Candidature, Party and Campaign Rights and Responsibilities**

- (1) Everyone has the right to take part in the government of their country and shall have an equal opportunity to become a candidate for election. The criteria for participation in government shall be determined in accordance with national constitutions and laws and shall not be inconsistent with the State's international obligations.
- (2) Everyone has the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election.
- (3) Everyone individually and together with others has the right:
  - To express political opinions without interference;
  - To seek, receive and impart information and to make an informed choice;
  - To move freely within the country in order to campaign for election;
  - To campaign on an equal basis with other political parties, including the party forming the existing government.

- (4) Every candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views.
- (5) The right of candidates to security with respect to their lives and property shall be recognized and protected.
- (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.
- (7) The above rights may only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society in the interests of national security or public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States' obligations under international law. Permissible restrictions on candidature, the creation and activity of political parties and campaign rights shall not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- (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.
- (9) Candidature, party and campaign rights carry responsibilities to the community. In particular, no candidate or political party shall engage in violence.
- (10) Every candidate and political party competing in an election shall respect the rights and freedoms of others.
- (11) Every candidate and political party competing in an election shall accept the outcome of a free and fair election.

#### **4. The Rights and Responsibilities of States**

- (1) States should take the necessary legislative steps and other measures, in accordance with their constitutional processes, to guarantee the rights and institutional framework for periodic and genuine, free and fair elections, in accordance with their obligations under international law. In particular, States should:
  - Establish an effective, impartial and non-discriminatory procedure for the registration of voters;
  - Establish clear criteria for the registration of voters, such as age, citizenship and residence, and ensure that such provisions are applied without distinction of any kind;
  - Provide for the formation and free functioning of political parties,

possibly regulate the funding of political parties and electoral campaigns, ensure the separation of party and State, and establish the conditions for competition in legislative elections on an equitable basis;

- Initiate or facilitate national programmes of civic education, to ensure that the population are familiar with election procedures and issues;
- (2) In addition, States should take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals, including through the establishment of a neutral, impartial or balanced mechanism for the management of elections. In so doing, they should, among other matters:
- Ensure that those responsible for the various aspects of the election are trained and act impartially, and that coherent voting procedures are established and made known to the voting public;
  - Ensure the registration of voters, updating of electoral rolls and balloting procedures, with the assistance of national and international observers as appropriate;
  - Encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period;
  - Ensure the integrity of the ballot through appropriate measures to prevent multiple voting or voting by those not entitled thereto;
  - Ensure the integrity of the process for counting votes.
- (3) States shall respect and ensure the human rights of all individuals within their territory and subject to their jurisdiction. In time of elections, the State and its organs should therefore ensure :
- That freedom of movement, assembly, association and expression are respected, particularly in the context of political rallies and meetings;
  - That parties and candidates are free to communicate their views to the electorate, and that they enjoy equality of access to State and public-service media;
  - That the necessary steps are taken to guarantee non-partisan coverage in State and public-service media.
- (4) In order that elections shall be fair, States should take the necessary measures to ensure that parties and candidates enjoy reasonable opportunities to present their electoral platform.
- (5) States should take all necessary and appropriate measures to ensure that the principle of the secret ballot is respected, and that voters are able to cast their ballots freely, without fear or intimidation.
- (6) Furthermore, State authorities should ensure that the ballot is conducted so as to avoid fraud or other illegality, that the security and the integrity

of the process is maintained, and that ballot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification.

- (7) States should take all necessary and appropriate measures to ensure the transparency of the entire electoral process including, for example, through the presence of party agents and duly accredited observers.
- (8) States should take the necessary measures to ensure that parties, candidates and supporters enjoy equal security, and that State authorities take the necessary steps to prevent electoral violence.
- (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.



# Part 1

Free and Fair Elections:  
Further Steps  
along the Democracy Road



## 1. INTRODUCTION

On 26 March 1994, the Inter-Parliamentary Council adopted the Declaration on Criteria for Free and Fair Elections. That Declaration, and the Study now reproduced in Part 2 below, were an early attempt to set out what was required by the concept of a free and fair election, considered from the perspective of international law and human rights, and in the light of the practice of States and international organizations.

At a Round Table to mark ten years of ‘free and fair’, organized by the Inter-Parliamentary Union in November 2004, there was a strong consensus that the original Study and the Declaration continued to serve their purpose; and that no ‘new edition’, as such, was called for. Instead, it was proposed that they be reissued, but with a new introductory part. Clearly, another ten or so years of relevant practice could hardly be ignored, while any assessment of the impact of the earlier work of the Inter-Parliamentary Union (IPU) on the development of international standards would need to look for signs of its influence in the organizations and institutions which provided the initial impetus; here, too, might be found evidence of incompleteness or redundancy, and of new or now more pressing challenges.

This new Part 1 – *Free and Fair Elections: Further Steps along the Democracy Road* seeks to meet some of these goals: to provide a short narrative of developments within the IPU and in various forums concerned with elections and democracy; to review progress generally in the adoption and consolidation of relevant international standards, through the work of the United Nations, including the General Assembly and the Commission on Human Rights, and in regional organizations; to assess developments in law and practice; to identify outstanding problematic areas; and to set out some of the bases for a present and future agenda.

The Inter-Parliamentary Union, of course, is not a ‘legislative’ body, and its declarations and resolutions are not directly attributable to States. However, the ‘authority’ of the criteria set out in the IPU Declaration derives not so much from their endorsement by the Inter-Parliamentary Council, though the nature and membership of that body is significant, as from their foundation – as is shown in Part 2 below, – in international law and in the practice of States and international organizations. What the IPU did was to translate, but not legislate, those principles into a single set of applicable criteria, showing clearly where particular electoral ‘moments’ are governed by a rule, subject to a principle, or to be managed in the light of crystallizing practice and the principle of the effectiveness of obligations. The authority of the criteria declared in 1994 has since been repeatedly confirmed. The UN General Assembly took note of the Declaration (in resolution 49/190, 23 December 1994), and the criteria have been incorporated into the practice of international organizations (including



the UN's Electoral Assistance Division, UNDP, and regional organizations, such as the OSCE, the Council of Europe and the Organization of African Unity/African Union). In addition, the Declaration and the Study have been translated into a dozen languages, often with the financial support of national and international non-governmental organizations engaged in the provision of electoral assistance. Over the years, they have become very much a handbook, *vade mecum*, or at least a primer on basic electoral standards. The international community of States, both through the United Nations General Assembly and in multiple regional organizations, has recognized repeatedly that, while the choice of electoral system may be a matter for each member of the society of nations, yet that system must satisfy certain international standards; among the most commonly accepted, for example, are the general principle of non-discrimination and the more specific norms confirmed and set out in universal and regional human rights instruments.

Nevertheless, while to lay out the relevant international rules and principles is one thing, it is often quite another to apply them in practice. No rule is self-applying; there must be a judge, assessor or even observer, to determine whether the facts meet the standard of the law, or whether particular circumstances fall within or outside the principle. Then as now, it is through *practice* – that of States, the United Nations, regional organizations, the IPU, and inter-governmental and non-governmental organizations – that concrete meaning is given to general terms, norms are consolidated, and the law is developed.

The last decade or so has seen a substantial and significant growth in the literature and the science of elections and democracy. Numerous elections have now been monitored by international observers, many of whom in turn have used their experience to flesh out what it means to 'assess' an election. The UN, regional organizations, and especially non-governmental organizations, have provided much practical, technical assistance in conducting elections and in 'constructing' democracy, developing, with commentators and practitioners, a wealth of commentary and guidelines intended to reflect on lessons learned and finally, if it can be done, to nail down once and for all what it means exactly to have a free and fair election.

In the meantime, although often removed from the, to some, unexciting practicalities of elections as process, international lawyers and practitioners have kept the 'democratic norm' under scrutiny, urging with varying enthusiasm its standing as a rule or principle of international law. Other jurists and theorists have revisited the fundamental premises of democracy, or sought to identify, analyse and resolve its present deficiencies or meet the new generation of challenges, often with exciting results.

As was noted in 1994 in the Introduction to the original study (see below, Part 2, section 1), key terms like 'periodic', 'free', 'fair', and 'genuine' possess

no easily verifiable content. The aim then was to get beyond subjective assessments and to present a standard which was as capable of objective application as possible, bearing in mind that no word or concept is self-applying; every assessment must be mediated through a judge or observer, often but not always in a context in which even reasonable people may come to different conclusions. Much the same approach has been adopted with regard to the present part, but with the particular aim of showing the extent to which our understanding of international electoral standards has been clarified in the practice of international organizations since 1994, and how the law also has developed.

There are some important differences, however. First, by contrast with Part 2, Part 1 makes little or any use of the multitude of election observation reports issued in recent years. The basic requirements for a free and fair electoral process are now largely beyond question, however, and practice today is geared, not so much to showing the crystallization and consolidation of norms and standards, as to working out their application at ground level. Extensive commentary is also available now, both on elections as they happen and in later review; much of this secondary literature is referred to below.

Second, the focus adopted for Part 1 has resulted in less attention apparently being given to some of the most active contributors to the practical implementation of international electoral standards, with many of whom the IPU enjoys a long collaborative relationship. The International Foundation for Electoral Systems (IFES), International IDEA, the National Democratic Institute (NDI), the International Republican Institute (IRI), and the Carter Center at Emory University are among those organizations which play a critical, ongoing role in the promotion of elections and democratic representative government; their achievements and the spirit of their work are essential to the background against which Part 1 is presented.<sup>1</sup>

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<sup>1</sup> IFES: [www.ifes.org](http://www.ifes.org) (see, among others, the Administration and Costs of Elections Project, accessible at the same URL); NDI: [www.ndi.org](http://www.ndi.org) (see also the NDI resource, [www.accessdemocracy.org](http://www.accessdemocracy.org)); IRI: [www.iri.org](http://www.iri.org); International IDEA: [www.idea.int](http://www.idea.int) (see also [www.quotaproject.org](http://www.quotaproject.org), a joint project with the University of Stockholm on the representation of women in parliament); Carter Center: [www.cartercenter.org](http://www.cartercenter.org) (see the Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers, launched at UN Headquarters, New York, on 27 October 2005).

## 2. EVOLVING AND CONSOLIDATING INTERNATIONAL STANDARDS

### 2.1 The Inter-Parliamentary Union

Since the adoption of the Declaration on Criteria for Free and Fair Elections in 1994, the Inter-Parliamentary Union has continued to contribute to the work of the United Nations and regional organizations, as well of its members, in the field of elections and democracy, and to keep its institutional focus on issues considered of paramount importance by the membership.

In 1997, it adopted the Universal Declaration on Democracy, now frequently cited by other international organizations and State and non-State actors; and in 1998 it published *Codes of Conduct for Elections*, including a draft model code which addressed a number of additional factors relevant to the conduct of free and fair elections. These included, the rule of law, political parties and funding, political parties, candidates and candidature, campaign activity and fair campaign practices, the role and responsibility of the media, election administration and polling (including the role of independent or impartial commissions, and of domestic and international observers), dispute resolution, and results.<sup>2</sup> These areas have continued to receive attention, while the IPU itself has both strengthened its relations with and its standing in the United Nations, and focused its work on issues which parliamentarians themselves have identified as critical to the democratic agenda and to parliaments as institutions representative of the population as a whole.<sup>3</sup>

#### 2.1.1 *The status of the IPU in its relations with the United Nations*

Already by 1994, the IPU had a long record of cooperation with the United Nations. However, its unique structure as an international organization of *parliaments*, rather than a treaty-based organization established by States or an inter-governmental arrangement, was then proving an obstacle to recognition of its special role by the international community. Within the UN in particular, the IPU found itself caught by the arrangements settled by the Economic and Social Council in 1946 for consultation with non-governmental organizations. As the IPU developed over the next forty-fifty years, however, consultative status became yet more inappropriate for other practical reasons, namely, that it excluded the Union from working with the main *political* organs of the United Nations, particularly the General Assembly.<sup>4</sup>

<sup>2</sup> Goodwin-Gill, G. S., *Codes of Conduct for Elections*, Geneva: Inter-Parliamentary Union, 1998.

<sup>3</sup> Cf. 'Activities of the IPU in 1999: Annual Report of the Secretary General', 103rd Conference, Amman, April 2000, 15 (Democracy).

<sup>4</sup> These issues and the history of the IPU's relations with the United Nations are set out in an Opinion on 'The international legal personality of the Inter-Parliamentary Union (IPU), its status as an international

The value of cooperation in this field had nevertheless long been recognized by the General Assembly.<sup>5</sup> In the Millennium Declaration, for example, it resolved,

‘to... further strengthen cooperation between the United Nations and national parliaments through their world organization, the Inter-Parliamentary Union, in various fields, including: peace and security, economic and social development, international law and human rights, democracy and gender issues.’<sup>6</sup>

Recalling ‘the unique inter-state character of the Inter-Parliamentary Union’, the General Assembly requested the Secretary-General to explore ways in which such ‘a new and strengthened relationship’ might be established between the IPU, the General Assembly and its subsidiary organs.<sup>7</sup> In 2002, the General Assembly duly invited the IPU to participate as an observer,<sup>8</sup> and since then the two bodies have prioritised their collaborative activities on projects to strengthen parliamentary systems, provide advice, promote human rights, and advocate gender partnership.<sup>9</sup> The IPU has also paid particular attention to peace and security, given the special role which parliaments can play in conflict prevention, conflict resolution, and reconciliation.<sup>10</sup>

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organization in international law, and the legal implications of such status for the IPU’s relations with governments and other international organizations’, prepared jointly by Ian Brownlie QC and the present author in May 1999, at the request of the IPU’s Secretary General, Anders Johnsson.

<sup>5</sup> See UNGA resolution 50/15, 15 November 1995; UNGA resolution 54/12, ‘Cooperation between the United Nations and the Inter-Parliamentary Union’, adopted without a vote, 27 October 1999; see also the debate at UN GAOR, UN doc. A/54/PV.41, 1-28; and ‘Activities of the IPU in 1999: Annual Report of the Secretary General’, 103rd Conference, Amman, April 2000, 41.

<sup>6</sup> Millennium Declaration, UNGA res. 55/2, 8 September 2000.

<sup>7</sup> UNGA res. 55/19, ‘Cooperation between the United Nations and the Inter-Parliamentary Union’, adopted without a vote, 8 November 2000; see also the debate at UN GAOR, UN doc. A/55/PV.55, 1-23.

<sup>8</sup> See UNGA res. 57/32, ‘Observer status for the Inter-Parliamentary Union in the General Assembly’, adopted without a vote, 19 November 2002, and for (brief) debate, see UN GAOR, UN doc. A/57/PV.52, 7-8; UNGA res. 57/47, ‘Cooperation between the United Nations and the Inter-Parliamentary Union’, adopted without a vote, 21 November 2002, and for (brief) debate, see UN GAOR, UN doc. A/57/PV.56, 4-6.

<sup>9</sup> See 108th IPU Conference and Related Meetings, ‘Results of the Proceedings’, Santiago de Chile (Chile), 3-12 April 2003, 9 (strengthening democracy and institutions by combining capacity building in parliamentary procedures and practice with improving knowledge in substantive areas such as human rights, promoting gender partnership) 109th IPU Assembly and Related Meetings, ‘Results of the Proceedings’, Geneva (Switzerland), 1-3 October 2003, 38-9 (overview of recent activities with UNDP and UNIFEM); and 41 (noting four types of activity as priority areas for cooperation). See also ‘Activities of the IPU in 2003: Annual Report of the Secretary General’, 110th Assembly, Mexico City, April 2004, 27-9; 111th IPU Assembly and Related Meetings, ‘Results of the Proceedings’, Geneva (Switzerland), 25 September–1 October 2004, 45 (proposals for a multi-year agenda for the three standing committees: Peace and International Security; Sustainable Development, Finance and Trade; Democracy and Human Rights).

<sup>10</sup> See 109th IPU Assembly and Related Meetings, ‘Results of the Proceedings’, Geneva (Switzerland), 1-3 October 2003, 17-21 (role of Parliaments in assisting multilateral organisations in ensuring peace and security); 110th IPU Assembly and Related Meetings, ‘Results of the Proceedings’, Mexico City (Mexico), 15-23 April 2004, 30-33 (resolution on ‘Furthering parliamentary democracy in order to protect human rights and encourage reconciliation among peoples and partnership among nations’, adopted by consensus, 23 April 2004.

### 2.1.2 The IPU's agenda

As indicated above, the status of women and gender partnership in public life has long been a principal concern of the IPU and its membership. The organization itself has taken practical steps to ensure that more women members of parliament are included in delegations to its conferences,<sup>11</sup> and has continued generally to monitor the progress of women in politics.<sup>12</sup> A resolution adopted at the 110<sup>th</sup> IPU Assembly in Mexico City in April 2004 on promoting international conciliation and assisting with post-conflict reconstruction requested parliaments to make use of the IPU's 'valuable expertise to promote a balanced gender perspective in the process.'<sup>13</sup> Another resolution on 'furthering parliamentary democracy',

*'Reaffirms that parliamentary democracy can only be truly meaningful if women are represented in parliament on the basis of full equality with men, both in law and practice, and strongly urges parliaments to ensure that such equality is achieved, inter alia, by the adoption of temporary special measures...'*<sup>14</sup>

Women in politics received further attention at the 111<sup>th</sup> IPU Assembly in Geneva in 2004, in an evaluation of Beijing + 10 from a parliamentary perspective.<sup>15</sup> The Assembly noted that ten years after the Beijing Conference, women continue to be under-represented in decision-making positions in parliament and government, and proposed positive measures to strengthen parliamentary action. In its view, there should be a stronger presence of women in decision-making structures within national parliaments and inter-parliamentary forums, as well as gender-balanced national representation in foreign parliamentary relations, at both the bilateral and multilateral levels. Parliaments should therefore actively promote gender equality, strive for equal representation and participation of women and men in their work, and aim for 50 per cent representation by women in all parliamentary committees, 'so that women can bring about changes in the approaches to the legislation prepared,

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<sup>11</sup> 'Activities of the IPU in 2001: Annual Report of the Secretary General', 107th Conference, Marrakech, March 2002, 41.

<sup>12</sup> 'Activities of the IPU in 2003: Annual Report of the Secretary General', 110th Assembly, Mexico City, April 2004, 19-23, 27-9.

<sup>13</sup> 'Promoting international conciliation, helping to bring stability to regions of conflict, and assisting with post-conflict reconstruction', adopted by consensus, 110th IPU Assembly and Related Meetings, Results of the Proceedings, Mexico City (Mexico), 15-23 April 2004, 22.

<sup>14</sup> 'Furthering parliamentary democracy in order to protect human rights and encourage reconciliation among peoples and partnership among nations', adopted by consensus, 110th IPU Assembly, Mexico City, 23 April 2004; above note, 30-33.

<sup>15</sup> 'Beijing + 10: An evaluation from a parliamentary perspective', adopted by consensus, 111th IPU Assembly and Related Meetings, Results of the Proceedings, Geneva (Switzerland), 25 September–1 October 2004, 30.

and also, but not solely, incorporate their diverse perspectives and concerns'.<sup>16</sup> Specifically, the Assembly urged parliamentarians to promote a stronger presence of women in political parties and in decision-making, for example, by the adoption of quota systems or other forms of affirmative action.<sup>17</sup> Finally, it stressed 'the need to ensure the full and equal access of women to civic education, information and training as voters and candidates, and to combat negative societal attitudes that discourage women's participation in politics...'<sup>18</sup>

The IPU has also retained its special interest in elections and democracy. A resolution adopted at the Mexico City Assembly in April 2004 emphasizes, among others, that 'truly free and fair elections', based on the secret ballot and universal suffrage, and monitored by independent election authorities, are 'always of paramount importance in the establishment of parliaments reflecting national diversity and, particularly in countries emerging from violent conflict... essential in consolidating and advancing the reconciliation process.' It called on parliaments to respect the political rights of opposition parties and freedom of the press, and stressed the particular responsibility of individual parliamentarians and their political parties in promoting tolerance of diversity. The IPU was encouraged to involve itself in parliamentary election monitoring and observation, 'so as thereby to contribute to the legitimacy of the parliaments thus elected.'<sup>19</sup>

Nor has IPU concern been limited to traditional issues of principle. Taking the view that new information and communication technologies (NICTs)

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<sup>16</sup> Ibid., para. 7.

<sup>17</sup> Ibid., para. 16. Cf. recent action also on the electoral rights of the disabled: 'Activities of the IPU in 2003: Annual Report of the Secretary General', 110th Assembly, Mexico City, April 2004, 18. The International Foundation for Election Systems (IFES) has established a 'clearinghouse' for information on the participation of people with disabilities in the electoral process: see [www.electionaccess.org](http://www.electionaccess.org). Together with International IDEA, it convened a workshop in 2002, which brought together participants from twenty-four nations, disability rights experts, election administration officials, the IPU, the Council of Europe, and the OSCE, in drafting the 'Bill of Electoral Rights for Citizens with Disabilities'. Within the UN, General Assembly resolution 56/168 of 19 December 2001 established an *Ad Hoc* Committee, 'to consider proposals for a comprehensive and integral international convention to promote and protect the rights and dignity of persons with disabilities'. The *Ad Hoc* Committee will continue its review of the draft convention at its seventh session in January 2006; article 29 deals with participation in political and public life: <http://www.un.org/esa/desa>.

<sup>18</sup> Ibid., para. 17. In expressing its concern at the 'alarming situation' in Iraq, the Assembly also called for 'the holding of free and fair elections for the restoration of the rule of law and the establishment of a new and legitimate parliament, and for 'the full participation of women...'

<sup>19</sup> 'Furthering parliamentary democracy in order to protect human rights and encourage reconciliation among peoples and partnership among nations', adopted by consensus, 23 April 2004, Part C, paras. 2, 3, 5, 15; see 110th IPU Assembly and Related Meetings, 'Results of the Proceedings', Mexico City (Mexico), 15-23 April 2004, 30-33. The October 2004 IPU Assembly in Geneva took note of a statement made by the Speakers of the Parliaments of countries neighbouring Iraq (at a meeting convened by the Inter-Parliamentary Union, Amman, Jordan, 12-13 May 2004), in which the participants expressed their belief, 'that the well-established IPU Criteria on Free and Fair Elections can be useful to the Iraqi people in preparing the electoral process', and urged the UN to make them available. See 111th IPU Assembly and Related Meetings, 'Results of the Proceedings', Geneva (Switzerland), 25 September-1 October 2004, 56 (paras. 15, 16).

can help to consolidate and renew parliamentary democracy by allowing better participation by all citizens, a resolution adopted in 2003 calls on parliaments and their members to use NICTs, ‘to enhance the effectiveness, efficiency and transparency of their activities and to better connect with the electorate’; and calls on the international community to promote their use to enhance civic involvement in public decision-making. It urges the IPU in turn to encourage the use of NICTs in the organization of elections, so as to guarantee the democratic process, and encourage and assist parliaments in this field, ‘with a view to consolidating parliamentary democracy’.<sup>20</sup>

However, the IPU and its members are also sensitive to the risk that fundamental principles of representative democracy may be compromised in relations with an intergovernmental organization such as the United Nations. At the 111<sup>th</sup> IPU Assembly, held in Mexico City in April 2004, the Governing Council expressed its reservations about the UN High Level Panel’s views on relations between the UN and civil society, including parliamentarians and civil society (the Cardoso Panel). In the view of the Governing Council, the proposal to establish parliamentary committees subordinate to the authority of an intergovernmental organization such as the United Nations, ‘did not respect elementary principles of the separation and independence of powers, and fair representation and democratic legitimacy’.<sup>21</sup> With these reservations in mind, the IPU nevertheless continues to develop the ‘parliamentary’ dimension in international relations, and to keep under review key issues in the pursuit of democratic representative government.

## **2.2 The United Nations, the General Assembly, elections and democracy**

In his 1992 position paper, *An Agenda for Peace*, Boutros Boutros-Ghali, then Secretary-General of the United Nations, identified discrimination and exclusion as potential destabilizing factors.<sup>22</sup> In setting out his views on post-conflict peace-building, he referred to election monitoring, strengthening institutions and promoting political participation, with particular emphasis on democracy within nations as requiring respect for human rights and fundamental freedoms.

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<sup>20</sup> ‘The contribution of new information and communication technologies to good governance, the improvement of Parliamentary democracy and the management of globalisation’, adopted unanimously by the 109th IPU Assembly, Geneva, 3 October 2003: 109th IPU Assembly and Related Meetings, ‘Results of the Proceedings’, Geneva (Switzerland), 1-3 October 2003, 24-27.

<sup>21</sup> See 110th IPU Assembly and Related Meetings, ‘Results of the Proceedings’, Mexico City (Mexico), 15-23 April 2004, 10; also, 111th IPU Assembly and Related Meetings, ‘Results of the Proceedings’, Geneva (Switzerland), 25 September–1 October 2004, 9.

<sup>22</sup> Boutros Boutros-Ghali, *An Agenda for Peace*, New York: United Nations, 2nd edn., 1995, para. 11. The second edition includes the original position paper, ‘Report of the Secretary-General. An Agenda for Peace – Preventive diplomacy, peacemaking and peace-keeping’, UN doc. A/47/277-S/24111, 17 June 1992; and a Supplement issued on the 50th Anniversary of the United Nations: UN doc. A/50/60-S/1995/1, 3 January 1995.



‘[Democracy] requires as well a deeper understanding and respect for the rights of minorities and for the needs of the more vulnerable groups of society, especially women and children. This is not only a political matter. The social stability needed for productive growth is nurtured by conditions in which people can readily express their will. For this, strong domestic institutions are essential.’<sup>23</sup>

At this time, the Secretary-General’s ‘democratic challenge’ produced little immediate reaction.<sup>24</sup> In January 1992, ahead of the *Agenda for Peace*, the President of the Security Council had referred briefly to election monitoring in a statement issued on the Council’s behalf, and to ‘non-military’ sources of instability, but not to democracy as such.<sup>25</sup> Later statements in the following months were either non-committal or addressed other issues, such as fact-finding and sanctions and third States,<sup>26</sup> although that of 30 April 1993 did agree that activities such as electoral assistance and strengthening political structures ‘are important in restoring a sound basis for sustainable peace.’<sup>27</sup>

If response to the substantive claims made for democracy was lukewarm, the Secretary-General was undaunted. In a complementary report published in 1994, he linked the issues of popular participation, democracy and development.<sup>28</sup> Democracy, he said, ‘provides the only long-term basis for managing competing ethnic, religious, and cultural interests in a way that minimizes the risk of violent internal conflict.’<sup>29</sup> Moreover, ‘By providing for great popular participation, democracy increases the likelihood that national development goals will reflect broad societal aspirations and priorities.’<sup>30</sup> In his final position paper, *An Agenda for Democratization*,<sup>31</sup> Boutros-Ghali saw an emerging consensus on democratic government and ‘a deeper truth’: ‘democracy contributes to preserving peace and security,

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<sup>23</sup> Ibid., para. 81.

<sup>24</sup> For example, neither elections nor democracy are mentioned in UNGA resolution 47/120, ‘An Agenda for Peace: Preventive diplomacy and related matters’, 20 September 1993.

<sup>25</sup> UN doc. S/23500, 31 January 1992.

<sup>26</sup> See the following statements by the President of the Security Council: S/24210, 30 June 1992; S/24728, 29 October 1992; S/24872, 30 November 1992; S/25036, 30 December 1992; S/25184, 28 January 1993; S/25344, 26 February 1993; S/25493, 31 March 1993; S/25859, 28 May 1993.

<sup>27</sup> S/25696, 30 April 1993. The statement also acknowledged that ‘social peace is as important as strategic or political peace.’

<sup>28</sup> Boutros Boutros-Ghali, *An Agenda for Development*, New York: United Nations, 1995; originally published as a ‘Report of the Secretary-General’, UN doc. A/48/935, 6 May 1994: ‘In order to fulfil their potential, a people must participate actively in formulating their own goals and their voices must be heard in decision-making bodies as they seek to pursue their own most appropriate path to development’: para. 108.

<sup>29</sup> Ibid., para. 120. The Secretary-General noted that holding elections was only one element in democratization: *ibid.*, para. 124.

<sup>30</sup> Ibid., para. 128.

<sup>31</sup> Boutros Boutros-Ghali, *An Agenda for Democratization*, New York: United Nations, 1996.



social justice and human rights, and promoting economic and social development'.<sup>32</sup> While each State must determine its own path,

'... a fundamental prerequisite for democratization... [is] the existence of a State which is able and willing not only to create the conditions for free and fair elections, but also to support the development and maintenance of the institutions necessary for the ongoing practice of democratic politics.'<sup>33</sup>

As is shown below, the Secretary-General's attention to the democratic imperative in the years 1992-1996 has been increasingly matched by the General Assembly and the Commission on Human Rights. That interest has gone now beyond free and fair elections, looking to see whether elections lead, and are so conducted as to lead, to representative and accountable government. Today, the General Assembly and, in particular, regional organizations, place heightened emphasis on the need for the widest popular participation and on representation as both evidence and indicator of engagement in the political process by all sectors of civil society, but equally on the separation of powers, the rule of law, the protection of human rights, and the delivery of social justice. Among others, achieving the goal of equal participation of women and men in decision-making will thus provide a balance which more accurately reflects the composition of society, thereby strengthening democracy and promoting its proper functioning.<sup>34</sup>

The UN Millennium Declaration identified the following fundamental values as among those essential to international relations in the twenty-first century:

- **Freedom.** Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. *Democratic and participatory governance based on the will of the people best assures these rights.*
- **Equality.** No individual and no nation must be denied the opportunity to benefit from development. *The equal rights and opportunities of women and men must be assured.*
- **Solidarity.** Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity

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<sup>32</sup> Ibid., paras. 16-17. In his 2005 Report, UN Secretary-General Kofi Annan referred to the 'global acceptance of democracy as a universal value': *In Larger Freedom*, Report of the Secretary-General, New York: United Nations, 2005, paras. 148-152 (taking note also of the Warsaw Declaration of the Community of Democracies and the Seoul Plan of Action; see below, section 2.3.3).

<sup>33</sup> Ibid., para. 21. See also para. 87 and following on parliamentarians as international organizations' essential link to international public opinion.

<sup>34</sup> See Beijing Platform for Action, G. 181. Note also in particular Article 7, 1979 Convention on the Elimination of All Forms of Discrimination against Women; Article 21, 1948 Universal Declaration of Human Rights; Article 1, 1952, Convention on the Political Rights of Women; Article 25, 1966 International Covenant on Civil Political Rights.

and social justice. Those who suffer or who benefit least deserve help from those who benefit most.

• **Tolerance.** *Human beings must respect one other, in all their diversity of belief, culture and language.* Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted.<sup>35</sup>

The Declaration further affirmed Member States' resolve to 'spare no effort to promote democracy and strengthen the rule of law', and 'to work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries.'<sup>36</sup>

The issue of 'intervention in support of democracy' has also been debated, as can be seen from the adoption in various institutional forums of what has come to be known as the 'democracy clause'.<sup>37</sup> However, certain aspects of the issue remain highly controversial. The background proceedings to the Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*,<sup>38</sup> for example, include a 'heated debate' and no real consensus on this issue at the *Santiago Regional Roundtable Consultation* with non-governmental and other interested organizations in May 2001:

'Although democracy has become a norm and almost a moral value in the region, the overthrow of democracy does not seem a valid motivation for military intervention. Nevertheless, agreement formed around the idea that measures short of military ones, such as diplomatic warnings and sanctions, would be useful tools for the protection of democracy. On the other hand, since democracy has become a cherished value, threats to democratic rule might be followed by major violations of humanitarian values and thus justify intervention. Nevertheless, it was clear that most of those present saw "intervention to protect or promote democracy" as a sensitive and potentially dangerous issue, since the concept of democracy itself is relative and subject to distinct interpretations.'<sup>39</sup>

<sup>35</sup> UNGA res. 55/2, 'United Nations Millennium Declaration', 8 September 2000, para. 6 (emphasis added).

<sup>36</sup> *Ibid.*, paras. 24, 25.

<sup>37</sup> See below in this Part, sections 2.4.2, 2.4.3; also, Chesterman, Simon, *Just War or Just Peace?* Oxford: Oxford University Press, (2002), 98; Farer, Tom. J., 'Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect', 15 *Human Rights Quarterly* 716–750 (1993); Brown, Michael E., Sean M. Lynn Jones & Steven E. Miller, *Debating the Democratic Peace*, (Cambridge, MA: Cambridge University Press, 1996).

<sup>38</sup> *The Responsibility To Protect*. Supplementary Volume to the Report of the International Commission on Intervention and State Sovereignty, December 2001: Research, Bibliography, Background.

<sup>39</sup> *Ibid.*, 373. Cf. the account of the March 2001 Maputo Regional Roundtable Consultation, *ibid.*, 362.

Overall, the *Responsibility to Protect* report gives relatively *little* attention to democracy as such, or to elections as a component part of progress towards democracy.<sup>40</sup> Similarly, the Report of the High-level Panel on Threats, Challenges and Change, *A more secure world: Our shared responsibility*,<sup>41</sup> treats a number of peripheral and related issues, but does not address the central question of responsible, democratic government. Its primary focus is collective security, and it suggests that the UN build on the experience of regional organizations in developing a framework for ‘the protection of democratically elected Governments from unconstitutional overthrow’.<sup>42</sup> In passing, and in relation to preventive diplomacy and mediation, it refers to the need for greater consultation with and involvement in peace processes of important voices from civil society, especially those of women;<sup>43</sup> on the prevention of terrorism, that a comprehensive strategy should include ‘working to reverse the causes of facilitators of terrorism, including through promoting social and political rights, the rule of law and democratic reform’; and that the ‘core task’ of peace-building is to build effective public institutions which, ‘through negotiations with civil society, can establish a *consensual* framework for governing within the rule of law...’<sup>44</sup>

Nevertheless, outside the realm of the grand statement but within the context of a range of practical activities, the United Nations has maintained its interest in the democratic process and the mechanism of elections, along three themes in particular: (1) Enhancing the principle of elections; (2) Support for new or restored democracies; and (3) Respect for the principles of national sovereignty.<sup>45</sup> As will be seen, the resolutions on enhancing the effectiveness of the principle of periodic and genuine elections have been regularly adopted

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<sup>40</sup> *The Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty*, December 2001. In relation to self-determination, the report notes: ‘the responsibility to protect is fundamentally a principle designed to respond to threats to human life, and *not a tool for achieving political goals* such as greater political autonomy, self-determination, or independence for particular groups within the country...’ *Ibid.*, section 5.23 (emphasis supplied).

<sup>41</sup> ‘A more secure world: Our shared responsibility’, Report of the High-level Panel on Threats, Challenges and Change, UN doc. A/59/565, 2 December 2004.

<sup>42</sup> *Ibid.*, para. 94.

<sup>43</sup> See SC resolution 1325, 31 October 2000, on ‘Women, peace, and development’, particularly preambular paragraph 5 and operative paragraph 1, which ‘*Urges* Member States to ensure increased representation of women at all decision-making levels in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflict. The UN Office of the Special Gender Adviser took this resolution as the basis for a checklist for Liberia in 2003; see section 6 on elections: <http://www.peacewomen.org/>. See also Organisation internationale de la francophonie, Conférence des Femmes de la Francophonie, ‘Femmes, Pouvoir et Développement’, Déclaration finale de Luxembourg, le 5 février 2000, II, 1: Concernant le ‘pouvoir’.

<sup>44</sup> ‘A more secure world: Our shared responsibility’, above note 41, paras. 103(d), 148(a), 229.

<sup>45</sup> Since 2001, a more controversial but nevertheless related theme has been a developing world initiative on the ‘promotion of a democratic and equitable international order’; see UNGA res. 56/151, ‘Promotion of a democratic and equitable international order’, adopted 109-53-6, 19 December 2001; UNGA res. 59/193, adopted 125-55-6, 20 December 2004. Each resolution reaffirms, ‘that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing, and that democracy is based on the freely expressed will of the people to determine their own political,

without a vote. However, they have also been paralleled by an initially more contentious series of resolutions on respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes.<sup>46</sup>

### 2.2.1 *Enhancing the principle of elections*

In 1994, the General Assembly adopted resolution 49/190, one of the series dealing with strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization. Significantly, the resolution took note of the IPU's Declaration on Criteria for Free and Fair Elections which had been adopted in March that year. It strongly supported the continuation of the UN's electoral activities as a contribution to the democratization process, and endorsed the related work of the United Nations High Commissioner for Human Rights and the Centre for Human Rights in human rights training and education, assistance for legislative reform, and strengthening and reform of the judiciary, among others.<sup>47</sup> A similarly worded resolution was adopted the following year,<sup>48</sup> since when the subject has appeared on the agenda in every other year.

In 1997, resolution 52/129 noted that with first-time democratic elections now having been held in many States, the forms of UN assistance should be reassessed and adapted to support subsequent elections by strengthening national capacity-building, electoral institutions and civic education.<sup>49</sup> Resolution 54/173, adopted in 1999, finds the General Assembly,

*'Acknowledging that United Nations electoral assistance has facilitated the holding of successful elections in several Member States, which has resulted in the orderly and non-violent assumption of office by elected officials, recognizing that elections can be free and fair only if the secrecy of the ballot is protected and elections are held free of coercion and intimidation,*

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economic, social and cultural systems and their full participation in all aspects of their lives', and emphasizes that 'democracy is not only a political concept but that it also has economic and social dimensions'. The operative paragraphs stress the full realization of all human rights for all, including the right of all peoples to self-determination, 'by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development'; permanent sovereignty over natural wealth and resources; the right to development; the right to peace; and an 'international economic order based on equal participation in the decision-making process, interdependence, mutual interest, solidarity and cooperation among all States.'

<sup>46</sup> See below, Part 2, *Free and Fair Elections: The Development of International Law and Practice*, section 2.4.1.

<sup>47</sup> UNGA res. 49/190, 23 December 1994, (155-1-12), preamble and paras. 6, 9.

<sup>48</sup> UNGA res. 50/185, 22 December 1995, (156-0-15); the General Assembly emphasized the importance of assistance both before and after an election (para. 4), and cooperation with other international, governmental and non-governmental organizations (para. 10).

<sup>49</sup> UNGA res. 52/129, 12 December 1997, (157-0-15).

and underlining the importance of respect for the results of elections that have been verified as free and fair...<sup>50</sup>

Notwithstanding reservations by a number of States, the UN has continued to provide electoral assistance, a role considered to be ‘rooted in the Organization’s responsibility to cooperate with Member States to promote the basic rights enumerated in the Charter... and in the Universal Declaration of Human Rights’, particularly Article 21.<sup>51</sup> As the Secretary-General noted in his 2003 *Report* on strengthening the role of the UN in this field,

‘Experience has also shown that, just as the price of exclusion is often violence, the benefit of political inclusion is a much better prospect of stability. The free and fair competition of various political interests through effective institutions provides a non-violent avenue for resolving differences within a polity, and the outcome of this process tends towards a just mean that removes the incentive for violence.’<sup>52</sup>

Within this overall context, the objectives of UN electoral assistance have been described as follows:

‘(a) To assist Member States in their efforts to hold credible and legitimate elections in accordance with internationally recognized criteria;  
(b) To contribute to building, in the recipient country, a sustainable institutional capacity to organize democratic elections that are genuine and periodic and have the full confidence of the contending parties and the electorate.’<sup>53</sup>

As early as 1992, the Secretary-General appointed a focal point for electoral assistance activities,<sup>54</sup> the responsibilities for which lie now with the Under-Secretary-General for Political Affairs. The Electoral Assistance Division of

<sup>50</sup> UNGA res. 54/173, 17 December 1999, (153-0-11), preambular para. 3.

<sup>51</sup> ‘Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization, Report of the Secretary-General’, UN doc. 58/212, 4 August 2003, para. 2.

<sup>52</sup> *Ibid.*, para. 4. However, as noted in the Secretary-General’s *Report* for 2001, ‘There is no standardized formula for successful democratization and no established timetable. The potential for setbacks is real. Electoral assistance must therefore be flexible and focused not only on immediate electoral priorities but on the longer-term implications and the broader political and electoral environment’: ‘Enhancing the effectiveness of the principle of periodic and genuine elections’, Report of the Secretary-General, UN doc. A/56/344, 19 October 2001, para. 59.

<sup>53</sup> ‘Enhancing the effectiveness of the principle of periodic and genuine elections’, Report of the Secretary-General, UN doc. A/56/344, 19 October 2001, Annex II, Department of Political Affairs of the United Nations Secretariat and the United Nations Development Programme: note of guidance on electoral assistance, para. 3. Annex I provides a summary of electoral assistance activities between 1 October 1999 and 31 July 2001.

<sup>54</sup> See below, Part 2, *Free and Fair Elections: The Development of International Law and Practice*, section 2.4.1.

the Department of Political Affairs was established the same year, initially as the Electoral Assistance Unit, and provides technical support to the focal point, evaluating requests for electoral assistance, identifying and maintaining UN electoral standards, undertaking needs assessment missions, assisting the UN system and other organizations in designing electoral assistance projects, developing operational strategies for the electoral components of peacekeeping operations, maintaining a roster of electoral experts, facilitating the international observation of elections, and serving as the UN's institutional memory in the electoral field.<sup>55</sup> The United Nations Development Programme also plays a key role in providing technical assistance for electoral activities, and collaborates with the Electoral Assistance Division.<sup>56</sup>

Four United Nations agencies in particular<sup>57</sup> have collaborated to provide electoral support to women in post-conflict elections. In January 2004, for example, in preparation for the 48<sup>th</sup> Session of the Commission on the Status of Women, OSAGI organized an expert group meeting on 'Enhancing women's participation in electoral processes in post-conflict countries', with the support of DPA and in collaboration with UNDP and UNIFEM and other intergovernmental organizations. The objective was to ensure that gender equality is mainstreamed into all UN electoral assistance efforts, and the group's findings were introduced into the Commission's discussion of women's equal participation in conflict prevention, management and conflict resolution and in post-conflict peace-building.<sup>58</sup> The interest generated by the expert group meeting in turn led DPA and OSAGI to commission *Women and Elections*, a guidebook which identifies best practices and policies on increasing the participation of women.<sup>59</sup>

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<sup>55</sup> As described in paras. 5-14, 29-48 of the Secretary-General's *Report for 2001*, and para. 4 of Annex II; above note 52. During the period 1992-2004, one hundred and one States requested electoral assistance from the UN, and ninety-one were assisted: see [www.un.org/Depts/dpa/ead/](http://www.un.org/Depts/dpa/ead/)

<sup>56</sup> On collaboration and coordination, see the Secretary-General's *Report for 2001*, Annex II, above note 52, paras. 5, 6. See also UNDP, *Electoral Systems and Processes: Practice Note*, New York: United Nations Development Programme, January 2004; and further on the work of the Electoral Assistance Division and UNDP, see Bjornlund, Eric C., *Beyond Free and Fair: Monitoring Elections and Building Democracy*, Washington D.C.: Woodrow Wilson Center Press; Baltimore: Johns Hopkins University Press, 2004, 60-62.

<sup>57</sup> Department of Political Affairs-Electoral Assistance Division (DPA-EAD), Office of the Special Adviser on Gender Issues and the Advancement of Women (OSAGI), UNDP and the UN Development Fund for Women (UNIFEM).

<sup>58</sup> See 'Enhancing women's participation in electoral processes in post-conflict countries. Note by the Secretariat', UN doc. E/CN.6/2004/CRP.7, 26 February 2004, Commission on the Status of Women, Forty-eighth session, 1-12 March 2004.

<sup>59</sup> *Women and Elections: Guide to Promoting the Participation of Women in Elections*, New York: United Nations, 2005. The handbook looks at the legal framework, political participation, voter registration, voter education, electoral administration, and observation; while its focus is on post-conflict elections, the practices described are equally applicable to all electoral processes. It was launched in Geneva in October 2005, with a panel discussion which included the IPU. See generally [www.un.org/womenwatch/osagi](http://www.un.org/womenwatch/osagi).

Not surprisingly, there has been a shift in operational emphasis over the years. Requests for the provision of technical assistance have increased, but the demand for electoral observation has gone down; the electoral dimension now forms a significant part of peace-making and peace-building operations, while Member States look more and more to the UN for guidance on new and emerging technologies.<sup>60</sup> The Secretary-General's *Report for 2003* cites voter registration as an area in which technical assistance has contributed to reducing government expenditure, by supporting the use of civil registration databases as a basis for producing the electoral roll. It is here, however, that political interests frequently intersect with the technical and mechanical preparations for an election, for voter registration in turn is a potentially critical variable in the outcome of the ballot. Problems can arise (and the efficiency and actual or perceived equity of the registration process thrown into doubt), 'when electoral authorities must cede some control of the process, often to more politicized ministries, and thus cannot provide guarantees of independence, as normally expected by political parties.'<sup>61</sup>

The General Assembly has nevertheless strongly supported the UN's electoral activities, with only eight States abstaining from the relevant resolutions in 2001 and 2003.<sup>62</sup> Resolution 56/159 (2001), largely repeated in Resolution 58/180 (2003), maintained the basic principle that UN electoral assistance and support for the promotion of democratization are provided only at the specific request of the Member State concerned, and that Governments retain the fundamental responsibility of organizing free and fair elections. At the same time, the General Assembly recalled the principle by which the will of the people as expressed through periodic elections shall be the basis of government authority and noted that an increasing number of States are 'using elections as peaceful means of discerning the will of the people and of confidence building, thereby contributing to greater national peace and stability'. Consequently, it recognized, 'the need for strengthening democratic processes, electoral institutions and national capacity-building, including the capacity to administer fair elections, increase citizen participation and provide civic education...'<sup>63</sup> In its operative paragraphs, the resolution commended the electoral assistance provided by the UN on request and supported its continuation, 'on a case-by-case basis in accordance with the *evolving* needs of requesting countries to develop, improve and refine their electoral institutions

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<sup>60</sup> *Report for 2001*, above note 52, paras. 59-63; *Report for 2003*, above note 51, paras. 7, 8, 30-31, 42.

<sup>61</sup> *Report for 2003*, above note 51, paras. 38-39.

<sup>62</sup> UNGA res. 56/159, 'Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization', 19 December 2001 (162-0-8); UNGA res. 58/180, 22 December 2003 (169-0-8). The States abstaining on each occasion were Brunei Darussalam, China, Cuba, Democratic People's Republic of Korea, Libyan Arab Jamahiriya, Myanmar, Syrian Arab Republic, and Viet Nam.

<sup>63</sup> UNGA res. 56/159, Preamble.



and processes.’<sup>64</sup> The General Assembly also again emphasized the preconditions for UN involvement – the availability of adequate time to carry out an effective mission, and the existence of circumstances permitting both the conduct of free and fair elections and comprehensive and consistent reporting.<sup>65</sup>

### 2.2.2 *Support for new or restored democracies*

Since 1994, one of the more significant developments in United Nations practice has been the support provided by the United Nations and by regional organizations to the ‘new or restored democracies’.<sup>66</sup> In a series of annual resolutions to 2001, and biannually thereafter, the General Assembly has given its full support, unqualified by abstentions or negative votes, to a wide range of UN-sponsored activities in support of democracy, and encouraged successive conferences of the new or restored democracies.<sup>67</sup> General Assembly resolution 58/13, for example, took note of the conclusions of the parliamentarians’ forum held in Ulaanbaatar in 2003,<sup>68</sup> and of the contribution of the ensuing parliamentary declaration to the proceedings of the Fifth International Conference; it called on Member States and the UN to collaborate with the IPU and others to follow up and ‘to make additional efforts to identify possible steps in support of the efforts of Governments to promote and consolidate new or restored democracies’.<sup>69</sup>

Within the context of this series of resolutions, Member States concerned have taken a number of initiatives. In 1999, a ‘Code of Democratic Conduct’ which emerged from the follow-up to the Third International Conference was transmitted to the UN Secretary-General, with a view to its consideration and possible adoption by the General Assembly.<sup>70</sup> Among others, the Code recognized that ‘free and fair elections as well as separation of powers among the legislative, the executive and the judicial bodies are minimum requirements of any democratic society.’<sup>71</sup> It proposed that the General Assembly call upon Member States, to develop ‘an electoral system that consistently ensures free, fair and competitive elections’ by, among others,

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<sup>64</sup> *Ibid.*, para. 2, emphasis supplied.

<sup>65</sup> *Ibid.*, para. 4.

<sup>66</sup> UNGA res. 49/30, ‘Support by the United Nations system for the efforts of Governments to promote and consolidate new or restored democracies’, 7 December 1994 (adopted without a vote).

<sup>67</sup> See UNGA resolutions 50/133, 20 December 1995; 51/31, 6 December 1996; 52/18, 21 November 1997; 53/31, 23 November 1998; 54/36, 29 November 1999 (inviting support for the 2000 Benin Conference of New and Restored Democracies); 55/43, 27 November 2000; 56/96, 14 December 2001 (all adopted without a vote).

<sup>68</sup> This forum was organized by the IPU in cooperation with the Mongolian Parliament.

<sup>69</sup> UNGA res. 54/36, 29 November 1999.

<sup>70</sup> UN doc. A/54/178, ‘Letter dated 19 July 1999 from the Permanent Representative of Romania to the United Nations addressed to the Secretary-General’, 27 July 1999.

<sup>71</sup> *Ibid.*, Annex, para. IX.



respecting the equality of all citizens, taking measures to improve representation, promoting legislation and other measures to encourage the formation of political parties, allowing public financing, permitting small parties and independent candidates to participate, and guaranteeing free and equitable access to the media.<sup>72</sup> This proposal was debated in the General Assembly at its 64<sup>th</sup> Plenary Meeting on 29 November 1999,<sup>73</sup> when the draft resolution on a Code of Democratic Conduct was introduced by Romania.<sup>74</sup>

Many who spoke in the debate, particularly from among the new or restored democracies, expressed their support for the Code, and for the assistance provided by the UN and other States to the strengthening of democratic institutions. The Algerian delegate, however, speaking on behalf of 12 other States as well,<sup>75</sup> objected on the ground that the General Assembly was being asked ‘to endorse a set of rules on a very sensitive issue that were drafted outside the United Nations’, and which had never been discussed or studied in the UN.<sup>76</sup> While themselves strongly committed to democracy and the protection and promotion of all human rights, their proposed amendments essentially attempted to prevent the General Assembly from departing from its mandate.<sup>77</sup> No formal response appears to have been given to these objections, but it was duly decided to postpone action on the draft and the amendments to a later date.<sup>78</sup>

Nevertheless, a number of other States took advantage of the debate to present particular aspects of democracy, as it appeared to them. Among them, Mr. Kolby (Norway) recalled that year’s Commission on Human Rights resolution on the right to democracy, adding that the link between democracy and human rights was self-evident.<sup>79</sup> At the same time, however,

‘Democracy must prove that it serves the common good and that it is responsive to the will of the people. It must allow real participation in which all are equal and in which there are no privileges.’<sup>80</sup>

Apathy and a feeling of futility were nevertheless serious threats to democracy, and it was important to strengthen civil society, ‘so that people can be put in

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<sup>72</sup> Ibid., Annex, para. 3.

<sup>73</sup> UNGA Official Records, 54th Session, 64th Plenary Meeting, 29 November 1999, UN doc. A/54/PV.64.

<sup>74</sup> UN doc. A/54/L.23; see UN General Assembly, *Official Records*, UN doc. A/54/PV.64, 29 November 1999 (with forty-four other sponsors and a further twelve States indicating their willingness to co-sponsor).

<sup>75</sup> China, Cuba, Egypt, Iraq, Lao People’s Democratic Republic, Libyan Arab Jamahiriya, Malaysia, Pakistan, Singapore, Sudan, Syria, and Viet Nam.

<sup>76</sup> UN doc. A/54/PV.64, above note 74, 3.

<sup>77</sup> See UN doc. A/54/L.46. It may be recalled that the General Assembly ‘noted’ the IPU Declaration on Free and Fair Elections in UNGA res. 49/190, 23 December 1994.

<sup>78</sup> UN doc. A/54/PV.64, above note 74, 26.

<sup>79</sup> Ibid., 5-6; on the Commission’s resolution, see further below.

<sup>80</sup> Ibid., 6.

a position to influence developments that affect them at the national and local level.’<sup>81</sup>

Mr. Ortique (United States of America) noted that democracy is not a ‘function of a single election or a single document’:

‘It depends on many factors, such as the development of a strong civil society, an informed citizenry, a free press, a loyal opposition and respect for human rights and the rule of law.’<sup>82</sup>

Mr. Pal emphasized that India’s choice of democracy reflected a consensus that, ‘precisely because... we were so diverse, only a system of governance that respected plurality would work...’<sup>83</sup> Nevertheless, democracy depended also on economic and social development, a point endorsed by the delegates for Niger, Nicaragua, Bangladesh, Argentina, Botswana, and Benin.<sup>84</sup>

Although not formally adopted, the essential elements of the ‘Code of Democratic Conduct’ were nevertheless incorporated the following year in resolution 55/96, ‘Promoting and consolidating democracy’.<sup>85</sup> The General Assembly expressly acknowledged Commission on Human Rights resolutions 1999/57 (on promotion of the right to democracy) and 2000/47 (on promoting and consolidating democracy),<sup>86</sup> and laid particular stress on the crucial importance of ‘maximizing the participation of individuals in decision-making and the development of effective public institutions’.<sup>87</sup> The resolution further calls upon States to promote and consolidate democracy by, among others:

‘(d) Developing, nurturing and maintaining an electoral system that provides for the free and fair expression of the people’s will through genuine and periodic elections, in particular by:

(i) Guaranteeing that everyone can exercise his or her right to take part in the government of his or her country, directly or through freely chosen representatives;

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<sup>81</sup> Ibid. See also Ms. Tuya (Mongolia), *ibid.*, 6-8.

<sup>82</sup> *Ibid.*, 9-11.

<sup>83</sup> *Ibid.*, 11-12. He noted also that, despite occasional backsliding, ‘democracy is the one norm on which there is almost universal consensus’, citing the strength of the Inter-Parliamentary Union as ‘a good barometer of democratic progress’.

<sup>84</sup> *Ibid.*, 18-25. Mr. Chowdhury (Bangladesh) emphasized the importance of ‘decentralization’ – bringing democracy to the grass roots through the ‘transfer of more powers to democratically elected local bodies, such as union, *thana/upazila* and district councils’: *ibid.*, 22.

<sup>85</sup> UNGA res. 55/96, ‘Promoting and consolidating democracy’, 4 December 2000, adopted by 157 votes to none, with 16 abstentions (Bahrain, Bhutan, Brunei Darussalam, China, Cuba, Democratic Republic of the Congo, Honduras, Lao People’s Democratic Republic, Libyan Arab Jamahiriya, Maldives, Myanmar, Oman, Qatar, Saudi Arabia, Swaziland, Viet Nam; Honduras subsequently advised that it had intended to vote in favour).

<sup>86</sup> See further below in this Part, section 2.3.1.

<sup>87</sup> UNGA res. 55/96, ‘Promoting and consolidating democracy’, 4 December 2000, para. 1(a).

(ii) Guaranteeing the right to vote freely and to be elected in a free and fair process at regular intervals, by universal and equal suffrage, conducted by secret ballot and with full respect for the right to freedom of association;

(iii) Taking measures, as appropriate, to address the representation of under-represented segments of society;

(iv) Ensuring, through legislation, institutions and mechanisms, the freedom to form democratic political parties that can participate in elections, as well as the transparency and fairness of the electoral process, including through appropriate access under the law to funds and free, independent and pluralistic media;

(e) Creating and improving the legal framework and necessary mechanisms for enabling the wide participation of all members of civil society in the promotion and consolidation of democracy...<sup>88</sup>

While these and related resolutions provide the policy and programmatic context, the range of activities engaged in or supported by the United Nations systems is described in the various annual reports of the Secretary-General.<sup>89</sup> In the period 1989-1996, for example, 76 Member States and 2 non-members (Palestine and Western Sahara) requested electoral assistance, which was provided in 69 cases.<sup>90</sup> In addition, the conferences held under the new or restored democracies rubric have contributed in turn to the development and dissemination of thinking on elections and democracy issues. As the Secretary-General reported in 1997, the Third International Conference, held in Bucharest, called attention to the important question of how to monitor progress in democratization, noting that, ‘The observation of elections alone will not therefore suffice as a yardstick for measuring democratization. Rather it should be undertaken in concert with more long-term efforts to consolidate democracy.’ This would require a significant change in the way in which the UN system provides electoral assistance. This Conference likewise observed that, ‘The active participation of both sexes is an absolute necessity in a process of consolidating democracy’, but that despite the provisions of various treaties and covenants, equality among men and women was still a long way off.<sup>91</sup>

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<sup>88</sup> Ibid., para. 1(d),(e).

<sup>89</sup> See the Secretary-General’s Reports on ‘Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies’, UN docs. A/51/512, 18 October 1996; A/52/513, 21 October 1997; A/53/554, 29 October 1998; A/54/492, 22 October 1999; A/55/489, 13 October 2000; A/56/499, 23 October 2001; A/58/392, 26 September 2003.

<sup>90</sup> UN doc. A/51/512, 18 October 1996, Annexes 1, 2. See also UN doc. A/53/554, 29 October 1998, paras. 34-38 (on the activities of UNDP, EAD and UNHCHR).

<sup>91</sup> UN doc. A/52/513, 21 October 1997, paras. 29-30, 37-39.

These issues were followed up in the preparatory process for the Fourth Conference in 2000. A meeting hosted by the Government of Benin, in collaboration with the International Organization of la Francophonie, emphasized that,

‘... democracy must be embedded in a political system built on the rule of law and respect for human rights. The role of civil society, women and young people in democratization as well as the fundamental need for the peaceful alternation of leaders in power were stressed. The promotion of a democratic culture, based on tolerance, acceptance of differences and a permanent search for compromise, was seen as an essential factor for the consolidation of democracy.’<sup>92</sup>

Elections were recognized as playing an important role, which must be maintained, but they do not create democracy and therefore should also ‘be part of a long-term undertaking that will lead to a strengthening of national institutions and democratic processes.’<sup>93</sup> Local elections, in particular, should be recognized for the important role they often play in providing the ‘first direct link between a voter and an elected official.’<sup>94</sup> In contrast to the relatively quick changes achieved through elections, however, consolidating the rule of law at national level, with its ability to exercise ‘the most pervasive influence on government and society as a whole’, is a much longer-term project requiring continuing international support for the essential processes of fundamental institutional reform and changes in attitude.<sup>95</sup>

The Cotonou Conference, held in December 2000, adopted the ‘Declaration on Peace, Security, Democracy and Development’, in which the ministers and representatives of new or restored democracies reaffirmed the basic principles of election-based representative democracy.<sup>96</sup> In his report for 2001, the Secretary-General acknowledged this development, and the strengthening of relevant international standards; he called attention to the near doubling of the number of democracies during the 1990s, but also to the fact that there was no ‘single model’:

‘To be sustainable, the democratic order of a State must be authentic and reflect the culture, history and political experience of its citizens. Democracy must be seen as a process that requires much more than the conduct of

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<sup>92</sup> UN doc. A/55/489, 13 October 2000, para. 10.

<sup>93</sup> *Ibid.*, paras. 20, 21.

<sup>94</sup> *Ibid.*, para. 23: ‘This connection between elector and elected, and the accountability of those elected at the local level, provides an important training ground for promoting democracy at the national level’.

<sup>95</sup> *Ibid.*, paras. 24-27.

<sup>96</sup> UN doc. A/56/499, 23 October 2001, para. 13: the power of public authorities must be based on the will of the people, expressed freely in periodic, fair, pluralistic elections, free of intimidation, conducted by universal, equal suffrage and secret balloting and under the supervision of an independent institution, and public authorities must be accountable for their acts.

elections. While recognizing the importance for democracy of periodic free and fair elections, a democratic system should also provide opportunities for people to participate fully in all aspects of society. Viewed from this perspective, another essential element of democracy is the rule of law. Democracy must encompass those principles, rules, institutions and procedures that ensure representation and accountability and protect the individual or groups against arbitrary behaviour, injustice or oppression by the State or other actors.<sup>97</sup>

Not surprisingly, therefore, the continuous reaffirmation of the principles and criteria for free and fair elections has been frequently paralleled by insistence on standards laid out in broader instruments, such as the IPU's 1997 Universal Declaration on Democracy,<sup>98</sup> and by the growing support for principled opposition to military and other coups against democratically elected governments and thus also against the free will of the people as expressed through elections.<sup>99</sup>

### 2.2.3 *Respect for the principles of national sovereignty*

Over many years, the General Assembly's resolutions on respect for the principles of national sovereignty and non-interference in the electoral processes operated as counterweight to what many States perceived as an unjustifiable extension of UN activity into the reserved domain of domestic jurisdiction. This caution is reflected also in the regular endorsement, even in 'approving' resolutions, of the principle that UN electoral assistance is to be provided only 'at the specific request of the Member State concerned'.<sup>100</sup> Many States nevertheless considered that a stronger defence of sovereignty and the reserved domain was required, together with the endorsement of a number of related principles of particular and lasting interest to the developing world. Voting tended to be divisive; in 1997 the resolution on respect for principles of national

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<sup>97</sup> Ibid., para. 26.

<sup>98</sup> Ibid., para. 17. See also UN doc. A/54/492, 22 October 1999, para. 26.

<sup>99</sup> In its own resolution on the subject, adopted in October 2000, the Inter-Parliamentary Union recognized that one of the essential means of preventing threats to democracy was to ensure the full participation in democratic processes of all sectors of society, including women, minorities and vulnerable groups. The UN Secretary-General's 2003 report took note of discussions at the Fifth Conference in Ulaanbaatar, where attention had focused on the decline in trust of the authorities, particularly in some of the older democracies. The 'first past the post' electoral system was discussed, among others, and criticised as tending 'to bring about tensions and risks for long-term political stability: UN doc. A/58/392, 26 September 2003, para. 9. The UN had nevertheless continued to provide effective electoral assistance, particularly in post-conflict situations, and as part of peace-building and peacekeeping missions: *ibid.*, paras. 17, 27.

<sup>100</sup> Typical is UNGA res. 56/159, 'Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization', 19 December 2001, (162-0-8), second preambular paragraph.

sovereignty was adopted by 96 votes in favour, with 58 against and 12 abstentions, and in 1999, with 91 in favour, 59 against, and 10 abstentions.<sup>101</sup>

In 2001, however, a substantial shift in the voting pattern occurred. That year's resolution was adopted with 99 votes in favour, only 10 against, and 59 abstentions.<sup>102</sup> The 2003 resolution witnessed an increase to 111 votes in favour, with again 10 votes against, and 55 abstentions.<sup>103</sup> On each occasion, the negative votes were cast by Argentina, Australia, Canada, Chile, Israel, New Zealand, Norway, and the United States of America; Samoa and Tuvalu voted against the resolution in 2001, but were 'replaced' by Sudan and Switzerland in 2003.

Between 1997 and 2001, considerable changes were made in both text and tone, demonstrating an increasingly consensual approach to the governing principles, including the international aspects of what had traditionally been seen as essentially national processes. For example, the seventh preambular paragraph to the 1997 resolution,

*'Recognizing also that there is no single political system or single universal model for electoral processes equally suited to all nations and their peoples and that political systems and electoral processes are subject to historical, political, cultural and religious factors'*

becomes in 1999:

*'Recognizing also the richness and diversity of political systems and models for electoral processes in the world, based on national and regional particularities and various backgrounds'*

The eighth preambular paragraph in 1997,

*'Convinced that the establishment of the necessary mechanisms and means to guarantee full and effective popular participation in electoral processes corresponds to States'*

becomes in 1999:

*'Stressing the responsibility of States in ensuring ways and means to facilitate full and effective popular participation in electoral processes'*

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<sup>101</sup> UNGA res. 52/119, 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes', 12 December 1997 (96-58-12); UNGA res. 54/168, (91-58-10).

<sup>102</sup> The title had now been lengthened to 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in electoral processes as an important element for the promotion and protection of human rights': UNGA res. 56/154, 19 December 2001 (99-10-59).

<sup>103</sup> UNGA res. 58/189, 22 December 2003 (111-10-55).

Operative paragraph 1 in 1997, dealing with equal rights, self-determination and the right of all peoples freely to determine their political status and to pursue their economic, social and cultural development was significantly toned down in 2001. Operative paragraph 2 in 1997, reaffirming that it is the concern solely of peoples to determine methods and to establish institutions regarding the electoral process, was likewise moderated in 1999 and again in 2001; the General Assembly,

*'Reaffirms the right of peoples to determine methods and to establish institutions regarding electoral processes and that, consequently, States should ensure the necessary mechanisms and means to facilitate full and effective popular participation in those processes.'*<sup>104</sup>

Whereas the 1997 resolution reaffirmed,

*'that any activities that attempt, directly or indirectly, to interfere in the free development of national electoral processes, in particular in the developing countries, or that are intended to sway the results of such processes, violate the spirit and letter of the principles established in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations...'*<sup>105</sup>

this is moderated in 1999 and again thereafter to declare that the 'free development of the national electoral process in each State should be fully honoured in a manner that fully respects the principles established in the Charter', and so forth.<sup>106</sup> Similarly, the 1997 insistence that 'all countries have the obligation under the Charter to respect the right of others to self-determination and to determine freely their political status and pursue their economic, social and cultural development'<sup>107</sup> was finally dropped in 2001.

In 1997, operative paragraph 4 further reaffirmed,

*'that electoral assistance to Member States should be provided by the United Nations only at the request and with the consent of specific sovereign States, in strict conformity with the principles of sovereignty and non-interference in the internal affairs of States, or in special circumstances such as cases*

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<sup>104</sup> UNGA res. 56/154, 19 December 2001, para. 3 (second emphasis supplied). UNGA res. 58/189, 22 December 2003, adds the phrase: 'and consequently, that there is no single model of democracy or of democratic institutions' after 'electoral processes' in its corresponding paragraph 3.

<sup>105</sup> UNGA res. 52/119, para. 3.

<sup>106</sup> UNGA res. 58/189, para. 4.

<sup>107</sup> UNGA res. 52/119, para. 7.



of decolonization or in the context of regional or international peace processes...’

The italicized words were dropped in 1999,<sup>108</sup> the paragraph was further revised in 2001 (‘...United Nations electoral assistance is provided at the specific request of the Member State concerned’),<sup>109</sup> and moved to the preamble in 2001.<sup>110</sup> Furthermore, the ‘strong’ appeal to all States ‘to refrain from financing or providing, directly or indirectly, any other form of overt or covert support for political parties or groups and from taking actions to undermine the electoral processes in any country’,<sup>111</sup> becomes ‘*Calls upon*’ in 2001. The language of ‘overt or covert’ was dropped in 1999 in favour of ‘any other action that undermines...’, and in 2001 the focus was confined to financing political parties or other organizations.<sup>112</sup> The corresponding paragraph in 2003 repeats the wording adopted in 2001, calling upon all States,

‘to refrain from financing political parties or other organizations in any other State in a way that is contrary to the principles of the Charter and that undermines the legitimacy of its electoral processes...’<sup>113</sup>

Finally, 2001 witnessed the introduction of two new paragraphs: Operative paragraph 2 ‘*Reiterates* that periodic, fair and free elections are important elements for the promotion and protection of human rights’, while paragraph 8, ‘*Reaffirms* that the will of the people shall be the basis of the authority of government and that this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’<sup>114</sup>

The various resolutions adopted in the three fields identified above show both consistent endorsement of fundamental principles and continuing evolution in the positions adopted by States in their voting patterns. Although the terms of particular resolutions may lead to negative voting among certain States, there is nevertheless a clear record of support for the principle of free and fair elections, for its linkage to democratic representative and accountable government, and for a measure of international oversight, or interest, in the management of national processes.

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<sup>108</sup> UNGA res. 54/168, para. 4.

<sup>109</sup> UNGA res. 56/154, para. 5.

<sup>110</sup> UNGA res. 58/189, preambular paragraph 8: ‘*Recognizing* the contribution made by the United Nations of electoral assistance provided to numerous States upon their request.’

<sup>111</sup> UNGA res. 52/119, para. 5.

<sup>112</sup> UNGA res. 54/168, para. 5; UNGA res. 56/154, para. 6

<sup>113</sup> UNGA res. 58/189, para. 5.

<sup>114</sup> UNGA res. 56/154, paras. 2, 8; UNGA res. 58/189, paras. 2, 7. Through successive iterations of these resolutions, the General Assembly has nevertheless maintained its condemnation of ‘any act of armed aggression or threat or use of force against peoples, their elected Governments or their legitimate leaders.’ See, for example, UNGA res. 52/119, para. 6; UNGA res. 58/189, para. 6.



## 2.3 The Commission on Human Rights

Much of the preliminary and innovative work in the evolution of General Assembly resolutions has in fact been trailed in human rights bodies, and particularly in the Commission on Human Rights, where the focus has been strongly, if not exclusively, on the democratic agenda and its substantive, human rights content. In 2003, the Commission characterized the principle of periodic and genuine elections by universal suffrage and by secret ballot as having ‘universal validity’.<sup>115</sup> It has also recognized ‘participatory government, responsive to the needs and aspirations of the people’ as the foundation on which good governance rests,<sup>116</sup> and that, among others, ‘the existence of widespread absolute poverty inhibits the full and effective enjoyment of human rights and renders democracy and popular participation fragile...’<sup>117</sup>

### 2.3.1 *Promoting and consolidating democracy*

In one of its first resolutions on promoting and consolidating democracy in 1995, the Commission acknowledged the principle laid down in the Vienna Declaration, that ‘democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing’,<sup>118</sup> and that so far as democracy ‘best serves to facilitate individual and collective expression of freedom of opinion... the widest participation in the democratic dialogue by all sectors and actors of society must be promoted in order to come to agreements on appropriate solutions to the social, economic and cultural problems of a society.’ It also recognized ‘that freedom of opinion and expression is reflected in a democratic society through an electoral system which allows all tendencies, interests and feelings to obtain representation at the level of the executive and legislative power and, therefore, at all levels of power,’ and that ‘creation of the conditions for a democratic society is essential for the prevention of discrimination and for the protection of minorities.’

This approach has been consistently endorsed and elaborated in the years since, both in the Commission and the General Assembly, with the latter frequently responding to initiatives on aspects of democracy and the democratic process generated in the former. Resolution 1999/57, on promotion of the right to democracy, both recognized ‘the rich and diverse nature of the

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<sup>115</sup> Commission on Human Rights resolution 2003/36, ‘Interdependence between democracy and human rights’, 23 April 2003 (36-0-17), second preambular paragraph.

<sup>116</sup> Commission on Human Rights resolution 2002/76, ‘The role of good governance in the promotion of human rights’, 25 April 2002 (adopted without a vote), para. 1.

<sup>117</sup> Commission on Human Rights resolution 2002/30, ‘Human rights and extreme poverty’, 22 April 2002 (adopted without a vote), para. 1(c).

<sup>118</sup> Commission on Human Rights resolution 1995/60, ‘Ways and means of overcoming obstacles to the establishment of a democratic society and requirements for the maintenance of democracy’, adopted without a vote, 7 March 1995.

community of the world's democracies', and the right in international law, 'to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society.' Of particular relevance to the electoral process as an essential component in the democratic process, the Commission affirmed that the rights of democratic governance include:

- '(d) The right of universal and equal suffrage, as well as free voting procedures and periodic and free elections;
- (e) The right of political participation, including equal opportunity for all citizens to become candidates;
- (g) The right of citizens to choose their governmental system through constitutional or other democratic means;<sup>119</sup>

The Commission requested the Office of the High Commissioner for Human Rights to continue and expand its programmes to promote democracy and the rule of law, and to report thereafter on progress. The following year, the Commission recalled that States had undertaken 'commitments' to promote democracy and the rule of law, noted the increasing number of countries looking to build democratic societies, 'where individuals have the opportunity to shape their own destiny', and called upon States,

'To consolidate democracy through the promotion of pluralism, the protection of human rights and fundamental freedoms, maximizing the participation of individuals in decision-making and the development of competent and public institutions, including an independent judiciary, effective and accountable legislature and public service and an electoral system that ensures periodic, free and fair elections...'<sup>120</sup>

In a comprehensive endorsement of human rights and fundamental freedoms, the Commission further called upon States,

- '(d) To develop, nurture and maintain an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections, in particular by:
  - (iv) Ensuring the right of everyone to take part in the government of his/her country, directly or through freely chosen representatives;

<sup>119</sup> Commission on Human Rights resolution 1999/57 on 'Promotion of the right to democracy', 27 April 1999 (51-0-2); see also paragraphs (a), (b), (c), (f), (h), with regard to a broader range of rights relevant to elections considered as part a democratic process conforming to the rule of law. Separate votes rejected, among others, a proposal to delete the words 'the right to' from the title of the resolution (28-12-13); see *Report of the Fifty-Fifth Session of the Commission on Human Rights*, UN doc. E/CN.4/1999/167, E/1999/23, 20 July 1999, paras. 334-347.

<sup>120</sup> Commission on Human Rights resolution 2000/47, 'Promoting and consolidating democracy', 25 April 2000 (45-0-8), para. 1(a).

Guaranteeing the right freely to vote and to be elected in a free and fair process at regular intervals, by universal and equal suffrage, open to multiple parties, conducted by secret ballot;

(v) Taking measures as appropriate to address the representation of under-represented segments of society;

Ensuring, through legislation, institutions and mechanisms, the freedom to form democratic political parties as well as transparency and fairness of the electoral process, including through appropriate access to funds and free, independent and pluralistic media;

(e) To create and improve the legal framework and necessary mechanisms for enabling the wide participation of members of civil society – individuals, groups and associations – in the development of democracy...<sup>121</sup>

In 2001, the Commission reaffirmed that free and fair elections are an essential feature of democracy, but emphasized that they ‘must be part of a *broader process* that strengthens democratic principles, values, institutions, mechanisms and practices, which underpin formal democratic structures and the rule of law’.<sup>122</sup> It has also adopted a more normative approach to certain elements, ‘declaring’ in 2002,

‘that the *essential elements* of democracy include respect for human rights and fundamental freedoms, freedom of association, freedom of expression and opinion, access to power and its exercise in accordance with the rule of law, the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media...<sup>123</sup>

In its 2003 resolution on the interdependence between democracy and human rights, the Commission,

‘2. *Reaffirms* its conviction that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing; democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives;

3. *Also reaffirms* that democracy facilitates the progressive realization of all economic, social and cultural rights;

<sup>121</sup> Ibid., para. 1(d), (e). cf. UNGA res.55/96 above, 21-2.

<sup>122</sup> Commission on Human Rights resolution 2001/41, ‘Continuing dialogue on measures to promote and consolidate democracy’, 23 April 2001 (44-0-9), para. 4 (emphasis supplied).

<sup>123</sup> Commission on Human Rights resolution 2002/46, ‘Further measures to promote and consolidate democracy’, 23 April 2002 (43-0-9), para. 1 (emphasis supplied); see also Resolution 2003/36, para. 1.

4. *Recognizes* the comprehensive nature of democracy as a system of governance that encompasses procedures and substance, formal institutions and informal processes, majorities and minorities, mechanisms and mentalities, laws and their enforcement, government and civil society;
5. *Stresses* the need for equal opportunities for men and women to participate in political and public life...<sup>124</sup>

Democratic processes are not always irreversible, however, and there is a constant need continuously to protect, promote and consolidate democracy; the Commission therefore called on national parliaments, ‘to make continuous efforts aimed at strengthening the rule of law and democratic institutions’, and encouraged the Inter-Parliamentary Union actively to continue its contributions to that effect.<sup>125</sup>

In 2005, the Commission adopted one of its most comprehensive resolutions on democracy and the rule of law. After reiterating its position on the minimum ‘content’ of democracy,<sup>126</sup> the Commission went on to reaffirm,

‘the right of every citizen to vote and be elected at genuine periodic elections without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

Persons entitled to vote must be free to vote for any candidate for election and free to support or to oppose Government, without undue influence or coercion of any kind that may distort or inhibit the free expression of the elector’s will, and... the results of genuine elections should be respected and implemented...’<sup>127</sup>

It called upon States to continue to strengthen the rule of law and promote democracy by, among others, upholding the separation of powers, guaranteeing that no individual or public or private institution is above the law, and respecting equal protection under the law. In all of this, ‘an effective, transparent and accountable functioning of parliaments’ is essential, as is ‘their fundamental role in the promotion and protection of democracy and the rule of law.’<sup>128</sup>

### 2.3.2 *Strengthening popular participation*

Since 2001, the Commission has likewise paid particular attention to the goal of encouraging and strengthening popular participation in democratic processes.

<sup>124</sup> Commission on Human Rights resolution 2003/36, ‘Interdependence between democracy and human rights’, 23 April 2003 (36-0-17), paras. 2-5.

<sup>125</sup> *Ibid.*, paras. 10, 11.

<sup>126</sup> Commission on Human Rights resolution 2005/32, ‘Democracy and the rule of law’, 19 April 2005 (46-0-7), para. 1; see above, text to note 35.

<sup>127</sup> Commission on Human Rights resolution 2005/32, para. 2.

<sup>128</sup> *Ibid.*, para. 15.

However, developed States in particular have tended to resist attempts to link the electoral process to the broader issues of the democratic agenda, such as social justice, globalization and development. In the previous year, the General Assembly had highlighted ‘the crucial importance of the active involvement and contribution of civil society in processes of governance that affect the lives of people’, called for ‘maximizing the participation of individuals in decision-making’, and for ‘measures... to address the representation of under-represented segments of society.’<sup>129</sup> The Commission, in turn, welcomed Member States’ commitment, reflected in the Millennium Declaration, ‘to work collectively for more inclusive political processes allowing genuine participation by all citizens...’<sup>130</sup> The resolution, adopted by 28 votes in favour, 4 against and 21 abstentions,

‘7. Declares that full popular participation is only feasible if societies have democratic political and electoral systems which guarantee to all their citizens the possibility both to take part in the government of their country, directly or through freely chosen representatives, and to have equal access to public service, without discrimination of any kind...

9. Urges all States to foster a democracy that, inspired by the recognition of the inherent dignity and the equal and inalienable rights of all members of the human family, promotes people’s welfare, rejecting all forms of discrimination and exclusion, facilitates development with equity and justice, and encourages the most comprehensive and full participation of their citizens in the decision-making process and in the debate over diverse issues affecting society...’<sup>131</sup>

The following year, in a resolution which attracted three more negative votes and a still significant number of abstentions, the Commission ‘declared’ that ‘popular participation, equity, social justice and non-discrimination are essential

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<sup>129</sup> UNGA resolution 55/96, ‘Promoting and consolidating democracy’, 4 December 2000 (157-0-16), eleventh preambular paragraph; paras. 1(a), (d), (e).

<sup>130</sup> Commission on Human Rights resolution 2001/36, ‘Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy’, 23 April 2001 (28-4-21; negative votes were cast by Germany, Japan, United Kingdom and USA). The negative votes and abstentions appear to have been due to the resolution linking popular participation to equity, social justice and non-discrimination, and to questions of poverty and development: for example, ‘meeting the basic human needs essential for survival is a sine qua non condition for an effective democracy...’ (eleventh and twelfth preambular paragraphs; also, operative paras. 1, 2). See UN doc. E/CN.4/2001/SR.71, 7 December 2001, paras. 71-92; Canada at para. 88, Belgium at para. 89.

<sup>131</sup> Commission on Human Rights resolution 2001/36, above note, paras. 7, 9.

foundations of democracy'.<sup>132</sup> The linkages to civil and political rights, economic, social and cultural rights, and to the right to development were maintained, but equally the Commission recognized again that, 'full popular participation is only feasible if societies have democratic political and electoral systems' which guarantee participation in government.<sup>133</sup>

In 1993, there was a reduction in the number of abstentions, but a further increase in negative votes.<sup>134</sup> Again, the linkages to poverty, globalization and development,<sup>135</sup> generated resistance to a resolution otherwise strongly supportive of the principle of democratic electoral systems, as the following paragraphs confirm:

- '9. ... the will of the people shall be the basis of the authority of government and... 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;
10. ... free and fair elections, popular participation and control, collective deliberation and political equality are essential to democracy and must be realized through a framework of accessible, representative and accountable institutions subject to periodic change or renewal...'<sup>136</sup>

The 2004 and 2005 resolutions, drafted in similar terms, were both adopted by 28 votes in favour, 14 against, with 11 abstentions.<sup>137</sup> Not all Commission references to the right to development and the elimination of extreme poverty in the context of promoting and consolidating democracy have been equally

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<sup>132</sup> Commission on Human Rights resolution 2002/34, 'Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy', 22 April 2002 (29-7-17; negative votes were cast by Armenia, Belgium, Canada, Germany, Poland, Sweden, and the United Kingdom; See Commission on Human Rights, Report on the Fifty-eighth Session (18 March-26 April 2002), UN doc. E/2002/23, E/CN.4/2002/200, 164; summary records of the 50th Meeting were not available at the time of writing–August 2005).

<sup>133</sup> Commission on Human Rights resolution 2002/34, para. 7.

<sup>134</sup> Commission on Human Rights resolution 2003/35, 'Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy', 23 April 2003 (29-12-12; negative votes were cast by Australia, Austria, Belgium, Canada, France, Germany, Ireland, Poland, Sweden, Ukraine, United Kingdom, USA. See Commission on Human Rights, Report on the Fifty-ninth Session (17 March-24 April 2003), UN doc. E/2003/23, E/CN.4/2003/135, 138; summary records of the 57th Meeting were not available at the time of writing–December 2005).

<sup>135</sup> '...the right to development is a crucial area of public affairs in every country and requires free, active and meaningful popular participation...' Commission on Human Rights Resolution 2003/35, para. 5.

<sup>136</sup> *Ibid.*, paras. 9, 10.

<sup>137</sup> Commission on Human Rights resolution 2004/31, 'Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy', 19 April 2004 (28-14-11; negative votes were cast by Australia, Austria, Croatia, France, Germany, Hungary, Ireland, Italy, Netherlands, Republic of Korea, Sweden, Ukraine, United Kingdom, Ireland, USA. See Commission on Human Rights, Report on the Sixtieth Session (15 March-23 April 2004), UN doc. E/2004/23, E/CN.4/2004/127, 112, 409; summary records of the 55th Meeting were not available at the time of writing–August 2005). Commission on Human Rights Resolution 2005/29, 'Strengthening of popular participation, equity, social justice and non-discrimination as essential foundations of democracy', 19 April 2005 (28-14-11).

controversial.<sup>138</sup> Efforts by the Commission and the General Assembly to place democracy within the context of ‘a democratic and equitable international order’, however, have not generally been well received by States in the developed world.<sup>139</sup> In debate on the 2001 draft resolution, for example, Belgium (and the EU) were of the view that certain of the issues raised went beyond the mandate and competence of the Commission:

‘Le projet traite des relations entre les Etats et non des relations entre l’Etat et ses citoyens et de l’exercice des droits de l’homme individuels, sur lesquels portent les travaux de la Commission. En outre, il énonce des droits qui ne sont établis par aucun des instruments internationaux relatifs aux droits de l’homme existants. Il contient par ailleurs un certain nombre d’éléments qui vont à l’encontre des résolutions adoptées par consensus dans d’autres instances. L’Union européenne, qui continuera de contribuer activement aux débats sur ces questions dans les instances appropriées, votera donc contre le projet de résolution à l’examen.’<sup>140</sup>

The debate nevertheless continues, and given the accepted linkage between democracy and human rights, it seems unlikely that the demands of social justice and development can be ignored in the future.

### 2.3.3 *The role of regional and other organizations*

The Commission’s various resolutions on democracy and democratic processes have recognized the standard-setting contribution of regional and other organizations, and likewise invoked their continuing engagement in promotion and consolidation. Resolution 2000/47, for example, welcomed OAS resolution 1080 on representative democracy,<sup>141</sup> OAU decision 141/XXXV,<sup>142</sup> as well as the CSCE Moscow Document from 1991<sup>143</sup> and the Harare Declaration of the

<sup>138</sup> See, for example, Commission on Human Rights resolution 2002/46, preambular para. 7; adopted by 43-0-9; see also above section 2.3, note 117.

<sup>139</sup> See Commission on Human Rights resolutions 2001/65, ‘Promotion of a democratic and equitable international order’, 25 April 2001 (32-16-4); 2002/72, 25 April 2002 (32-15-6); 2003/63, 24 April 2003 (31-15-7); 2004/64, 21 April 2004 (31-17-7). In 2004, Australia, Austria, Croatia, France, Germany, Hungary, Ireland, Italy, Japan, Netherlands, Republic of Korea, Sweden, Ukraine, United Kingdom and USA voted against the resolution: UN doc. E/CN.4/2004/SR.57, 27 April 2004, paras. 30-32.

<sup>140</sup> UN doc. E/CN.4/2001/SR.77, 12 December 2001, paras. 60-66. See also UN docs. E/CN.4/2002/SR.56, 9 August 2002, paras. 53-59; E/CN.4/2003/SR.61, 26 May 2003, paras. 34-38; E/CN.4/2004/SR.57, 27 April 2004, paras. 30-33.

<sup>141</sup> Organization of American States, ‘Representative Democracy’, AG/RES. 1080 (XXI-O/91), adopted at the fifth plenary session, 5 June 1991.

<sup>142</sup> This decision of the Organization of African Unity (OAU), adopted during the Summit of Heads of State and Government at Algiers, Algeria, in July 1999, excludes any regime having gained power through unconstitutional means from the meetings of the organization: AHG/Dec. 141 (XXXV).

<sup>143</sup> Text in Brownlie, I. & Goodwin-Gill, G. S., *Basic Documents on Human Rights*, Oxford: Oxford University Press, 4th edn., 2002, 615-30.



same year.<sup>144</sup> It went on to note the initiatives taken by the countries participating in the first, second and third International Conferences of New or Restored Democracies, held in June 1988, July 1994 and September 1997, and looked forward to future events.<sup>145</sup> The following year, resolution 2001/41 took note, among others, of the ministerial conference, ‘Towards a Community of Democracies’, hosted by Poland in June 2000; the Warsaw Declaration adopted by that meeting; the International Symposium on the Practices of Democracy, Rights and Freedoms in the French-speaking Community, held in Mali in November 2000;<sup>146</sup> and the OAS seminar on the role of regional and multilateral organizations in the promotion and defence of democracy in February 2001.<sup>147</sup>

Resolution 2002/46 welcomed the measures for the promotion, consolidation and *protection* of democracy adopted by various regional, subregional and other organizations and initiatives, including the 1948 OAS Charter, the 1950 European Convention on Human Rights, the Millbrook Commonwealth Action Plan adopted in New Zealand in 1995, the 1992 Treaty on European Union, as amended by the 1997 Treaty of Amsterdam, the Constitutive Act of the African Union adopted in 2000, and the 2001 Inter-American Democratic Charter.<sup>148</sup> It invited Member States, relevant intergovernmental organizations and interested non-governmental organizations to continue to foster and participate in a systematic dialogue on the building of democratic societies and on factors in the success and failure of processes of democratization, and welcomed,

‘the adoption by various regional, subregional and other organizations and initiatives of institutional rules and structures which recognize *the interdependent relationship between democracy and the protection of human rights*, as well as the adoption of mechanisms designed to promote it, to prevent situations which affect or threaten democratic institutions, or to implement measures for the collective defence of democracy in the event of a serious disturbance or disruption of the democratic system...’<sup>149</sup>

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<sup>144</sup> Harare Commonwealth Declaration 1991, issued by Heads of Government in Harare, Zimbabwe, 20 October 1991: <http://www.thecommonwealth.org/>.

<sup>145</sup> Commission on Human Rights resolution 2000/47, ‘Promoting and consolidating democracy’, 25 April 2000 (45-0-8), paras. 11, 12, 13. The International Conference on New and Restored Democracies has been described by UNHCHR as, ‘an opportunity for democratic countries around the world, new and old, to share their experiences and best practices in the field of democracy, and to initiate research at the national, regional and international level’: UN doc. E/CN.4/2005/15, para. 3.

<sup>146</sup> Organisation internationale de la francophonie, ‘Déclaration de Bamako’, adopted at the ‘Symposium International sur le bilan des pratiques de la démocratie, des droits et des libertés dans l’espace francophone’, Bamako, le 3 novembre 2000: <http://agence.francophonie.org/>.

<sup>147</sup> Commission on Human Rights resolution 2001/41, ‘Continuing dialogue on measures to promote and consolidate democracy’, 23 April 2001 (44-0-9), preambular paragraphs 4, 5.

<sup>148</sup> Commission on Human Rights resolution 2002/46, ‘Further measures to promote and consolidate democracy’, 23 April 2002 (43-0-9), preambular para. 10.

<sup>149</sup> *Ibid.*, para. 5 (emphasis supplied).



Resolution 2003/36 took note of the Second Ministerial Conference of the Community of Democracies, held in Seoul in November 2002, and of the Seoul Plan of Action, which provides specific guidelines for the promotion, consolidation and protection of democracy worldwide.<sup>150</sup> It also called on the UN High Commissioner for Human Rights to pay increased attention to the work on promotion and consolidation by ‘the United Nations system, other regional and international intergovernmental organizations and relevant non-government organizations’, and to invite their views.

In 2004, the Commission expressly considered the question of ‘Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy’.<sup>151</sup> It invited them, ‘to engage actively in work at the local, national, subregional and regional levels... and to initiate exchanges with the United Nations system on their experiences’.<sup>152</sup> It welcomed the adoption at regional and sub-regional level of institutional rules designed to prevent situations which threaten democratic institutions or to implement measures for the collective defence of democracy.<sup>153</sup>

## 2.4 Regional and sub-regional developments: Some aspects

Since the publication of *Free and Fair Elections*, regional and sub-regional organizations have paid ever more attention to the related issues of democracy, elections and representative government. Activities at the regional level have ranged from the development of the modalities of operation and the publication of practical guidelines for the international observation and monitoring of

<sup>150</sup> Commission on Human Rights resolution 2003/36, ‘Interdependence between democracy and human rights’, 23 April 2003 (36-0-17), preambular para. 4.

<sup>151</sup> Commission on Human Rights resolution 2004/30, 19 April 2004 (45-0-8).

<sup>152</sup> *Ibid.*, para. 8.

<sup>153</sup> *Ibid.*, paras. 9, 11. See also Commission on Human Rights resolution 2005/32, ‘Democracy and the rule of law’, 19 April 2005 (46-0-7). A report prepared for the Commission by the Office of the UN High Commissioner for Human Rights in 2005 (‘Enhancing the role of regional, sub-regional and other organizations and arrangements in promoting and consolidating democracy’, Report of the Office of the High Commissioner for Human Rights, UN doc. E/CN.4/2005/127, 11 February 2005), noted that both the UN, (in particular, the Department of Political Affairs and its Electoral Assistance Division, UNESCO, and the Office of the United Nations High Commissioner for Human Rights) and regional organizations had provided technical assistance or funded projects aimed at improving aspects of the electoral process, including the participation of women in elections, general civic and voter education, strengthening the capacity of electoral commissions, improving voter registration, promoting the role of civil society and the role of the media, strengthening the capacity of election jurisdiction bodies, and electoral assistance in the form of observation missions, and the adoption of guidelines and principles on the conduct of elections. OHCHR and the Inter-Parliamentary Union, for example, collaborated on the preparation of a *Handbook on Human Rights for Parliamentarians*; and, with UNDP, in the organization of a seminar for members of parliamentary human rights bodies in Geneva in March 2004, on ‘Strengthening Parliament as a Guardian of Human Rights: The Role of Parliamentary Human Rights Bodies.’ OHCHR has also prepared a compilation of texts adopted by various international, intergovernmental, regional and sub-regional organizations aimed at promoting and consolidating democracy; see ‘Report of the Office of the High Commissioner for Human Rights’, UN doc. E/CN.4/2005/57, 14 December 2004 and [www.ohchr.org](http://www.ohchr.org).

elections, to the promotion of democracy as a criterion for continuing membership of regional institutions, to the refinement and consolidation of electoral standards in the manner of the IPU's Declaration, and to reviews of the very nature and future of democracy and analysis of its present shortcomings.

In addition to notable developments at the regional and sub-regional level, in June 2000, one hundred and six States participating in a ministerial conference 'Towards a Community of Democracies', adopted the Warsaw Declaration.<sup>154</sup> In expressing their support for and continuing work to promote democracy, the participants strongly endorsed civil and political rights – the 'core democratic principles'<sup>155</sup> – but initially appeared somewhat less enthusiastic on the practical implications of the interdependence between peace, development, human rights and democracy stressed in the 1993 Vienna Declaration and Plan of Action.<sup>156</sup> A communiqué issued by the Government of Poland on behalf of the convening group referred to participants having 'emphasized that the economic and social dimensions of democratic development, including the eradication of poverty and equal participation by women in the democratic process should be urgently addressed', and suggested that the Warsaw Declaration included specific language affirming these goals.<sup>157</sup>

If that interpretation was somewhat generous, later meetings have been more forthcoming on these underlying issues. The second Community of Democracies conference in November 2002 adopted the Seoul Plan of Action, under the rubric, 'Democracy: Investing for Peace and Prosperity.'<sup>158</sup> While stressing the core principles endorsed at Warsaw, the Seoul document also engaged with the promotion of 'stronger democracy through good governance'.<sup>159</sup> It places particular emphasis on transparency and accountability,

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<sup>154</sup> See UN doc. A/55/328, 28 August 2000, Annex I.

<sup>155</sup> The 'core democratic principles' included the will of the people as the basis for the authority of government, 'expressed by exercise of the rights and civic duties of citizens to choose their representatives through regular, free and fair elections with universal and equal suffrage, open to multiple parties, conducted by secret ballot, monitored by independent electoral authorities, and free of fraud and intimidation': *Ibid.* A catalogue of the traditional civil and political rights followed, but with mention also of equal protection for minorities or disadvantaged groups, a competent, independent and impartial judiciary, the right of those duly elected for form a government, the necessity for government institutions to be 'participatory', and for such institutions and the legislature to be 'transparent and accountable'.

<sup>156</sup> Paragraph 8 of the Vienna Declaration provides: 'Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives...' World Conference on Human Rights, Vienna, 14-25 June 1993, 'Vienna Declaration and Programme of Action', UN doc. A/CONF.157/23, 12 July 1993; see also paras. 9, 27, 34, 66, 74.

<sup>157</sup> *Ibid.*, Annex II.

<sup>158</sup> See UN doc. A/57/618, 19 November 2002, Annex I.

<sup>159</sup> *Ibid.*, Part 4. At one point (Part 6, 'Coordinating Democracy Assistance'), it goes so far as to link free and fair elections, an independent judiciary, accountable government institutions, political parties, a free press, civil society, and a democratic political culture.

alleviating poverty and promoting economic growth, including through ‘sustainable social and economic development... stimulating social policies to fight exclusion, with due consideration to gender perspective and social inequalities derived from racial discrimination.’<sup>160</sup> The Plan of Action identifies the need to build and sustain, ‘a strong political party system and a healthy civil society’ by, among others, encouraging the public and private sectors to achieve equality between women and men, and ‘protecting and promoting the equal rights of women and men to engage in political activities.’<sup>161</sup>

The Third Conference in Santiago in April 2005 focused on ‘Cooperating for Democracy.’<sup>162</sup> The ‘Santiago Commitment’ expressly recognizes that democracy cannot be sustained without strict adherence to the principle of non-discrimination, and ‘persistent efforts to eliminate extreme poverty, underdevelopment, marginalization, economic disparities, and social exclusion.’<sup>163</sup> It further recognizes the importance of participation by civil society, and the need to that end to strengthen and modernize political parties and encourage full participation by women and young people. The Santiago Commitment likewise calls for special attention to the ‘implementation of free and fair elections, including the transparent and impartial administration of elections, and... a transparent system for their financing.’<sup>164</sup>

In 2004, the UN General Assembly itself urged ‘Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy’,<sup>165</sup> and indeed, in their practical and standard-setting work, regional organizations have commonly been in the vanguard of promotion and consolidation.

#### 2.4.1 *Africa*

Article 3 of the Constitutive Act of the African Union (AU), signed in Lomé, Togo, on 1 July 2000, includes among the organization’s objectives the promotion of popular participation and good governance, while Article 4 affirms the principles underlying the Union, including non-interference in internal affairs and respect for democratic principles, human rights, the rule of law and good governance.

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<sup>160</sup> Ibid., Part 4.2.

<sup>161</sup> Ibid., Part 4.3.

<sup>162</sup> The Community of Democracies, 2005 Santiago Ministerial Commitment, ‘Cooperating for Democracy’, CD/April 30, 2005.

<sup>163</sup> Ibid., 2 (preamble). A chapter specifically on ‘Poverty, Development and Democratic Governance’ recognizes the importance of the progressive realization of economic, social and cultural rights: *ibid.*, Part II. A follow-up working group on the subject was also established; see Part VI.

<sup>164</sup> Ibid., Part I, ‘Democratic Governance and Civil Society’, paras. 4, 5, 6.

<sup>165</sup> UNGA res. 59/201, ‘Enhancing the role of regional, subregional and other organizations and arrangements in promoting and consolidating democracy’, 20 December 2004 (172-0-15). Paragraphs 1 and 2 recognize again that the ‘essential elements’ of democracy include respect for human rights and fundamental freedoms, particularly the associated ‘political rights’, a pluralistic party system, the rule of law, the separation of powers, and accountability.

In 2002, the Assembly of Heads of State and Government of the OAU/AU adopted in turn the ‘Declaration on the Principles Governing Democratic Elections in Africa’.<sup>166</sup> Its preambular paragraphs recall the imperative of ‘ensuring good governance through popular participation’, while Part II emphasizes the ‘principles of democratic elections’: Elections are the basis of the authority of any representative government and constitute a key element of the democratization process. Article 4 provides:

‘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.’<sup>167</sup>

The Declaration proposes a programme of action as part of the responsibilities of States (Part III), including encouraging the participation of African women in all aspects of the electoral process.<sup>168</sup> Part IV, on rights and obligations, emphasizes not only the individual (and party) dimensions of political rights, but also the obligation to respect the authority of the Electoral Commission or other competent statutory body. Moreover,

‘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 Constitution and the electoral laws and accordingly respect the final decision of the competent Electoral Authorities or, challenge the result appropriately according to the law.’<sup>169</sup>

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<sup>166</sup> Thirty-Eighth Ordinary Session of the Organization of African Unity, 8 July 2002, Durban, South Africa, AHG/Decisions 171-184 (XXXVIII), AHG/Decl. 1-2 (XXXVIII), Decisions and Declarations.

<sup>167</sup> OAU/AU Declaration on the Principles Governing Democratic Elections in Africa 2002, II.4.

<sup>168</sup> In the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, adopted in July 2003, States parties agree in Article 8 that women and men are equal before the law and have the right to the equal protection and benefit of the law. Under Article 9, States agree to take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action; to adopt enabling legislation and other measures to ensure that women participate in elections without any discrimination; that women are represented equally at all levels with men in all electoral processes; and that women are equal partners with men at all levels of development and the implementation of State policies and programmes. See UN doc. E/CN.4/2005/127, 11 February 2005, paras. 24-26.

<sup>169</sup> OAU/AU Declaration on the Principles Governing Democratic Elections in Africa 2002, IV.13. The OAU is requested ‘to be fully engaged in the strengthening of the democratization process, particularly by observing and monitoring elections in our Member States’: *ibid.*, V. See also, African Union, ‘Elections Observation and Monitoring Guidelines’, 2004.

In April 2003, the African Union and the South African Independent Electoral Commission organized a Conference on Elections, Democracy and Governance in Pretoria which examined, among others, Draft Guidelines on Election Observation and Monitoring, and a Draft Declaration on Elections, Democracy and Governance in Africa. The Conference adopted a statement on the latter, ‘Affirming that the true test for the freeness, fairness and credibility is the acceptance of the election by the electorate’.

The various documents were submitted to the AU Maputo Summit in July 2003, where the Executive Council took note of the Conference communiqué and decided to present it to the Assembly, which in turn directed the Commission to transmit it to Member States for consideration and comments.<sup>170</sup>

In a comprehensive listing of principles recalling the language of the Inter-American Democratic Charter,<sup>171</sup> the draft Declaration affirmed that, ‘The peoples of Africa have a right to democracy and it is the obligation of its Governments and the peoples themselves to actively promote and defend it’, that ‘the effective exercise of representative democracy is the basis for the rule of law...’ and that respect for human rights and fundamental freedoms is amongst its ‘essential elements’.<sup>172</sup> Other provisions attached priority to strengthening political parties and participation, and to the independence of electoral administration. While stressing the rights and responsibilities of citizens, the draft Declaration also underlined the responsibility of governments to create an enabling environment.<sup>173</sup> Member States are responsible for organizing, conducting, and ensuring free and fair electoral processes within their territory, but the AU is also recognized as having a role in providing assistance and support, subject to considerations of sovereignty.<sup>174</sup>

At the sub-regional level, the Southern African Development Community (SADC) and the Southern African Development Community Parliamentary Forum (two autonomous organizations) have also engaged actively in the promotion of standards. SADC itself adopted the ‘Principles and Guidelines Governing Democratic Elections’ at the Mauritius Summit in

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<sup>170</sup> African Union, Decisions of the Assembly, Second Ordinary Session, 10-12 July 2003, Maputo, Mozambique, Decision on the Report of the Interim Chairperson on the Conference on Elections, Democracy and Good Governance, DOC. EX/CL/35 (III): Assembly/AU/Dec.18 (II).

<sup>171</sup> See further below.

<sup>172</sup> Draft Declaration on Elections, Democracy and Governance in Africa, adopted at the Conference on Elections, Democracy and Governance held in Pretoria, April 2003, Article 1.4.

<sup>173</sup> *Ibid.*, Article 1.7, 1.8, 1.9.

<sup>174</sup> *Ibid.*, Article 5. It has since been decided to turn the proposed Declaration into a charter, and the Electoral Institute of Southern Africa (EISA – see following note) drew up the first draft of what is now called the Charter on Democracy, Elections and Governance; this was completed in December 2005, and is to be considered at the January 2006 summit. The draft Charter differs from the Inter-American model, so far as it emphasizes the strengthening of democratic institutions and culture first and foremost, and locates the significance of elections within that.

September 2004.<sup>175</sup> These emphasize ‘full participation of the citizens in the political process’ as the first of the principles for conducting elections, and likewise include impartiality of the electoral institutions, voter education, and acceptance and respect of the election results, ‘proclaimed to have been free and fair by the competent National Electoral Authorities in accordance with the law of the land’.<sup>176</sup> The guidelines describe in detail both the rights and the obligations of SADC observers, and conclude with a comprehensive statement of the responsibilities of the State holding an election. These include not only ensuring the ‘traditional’ civil and political rights of individuals and parties, but also implementing the necessary institutional programmatic and logistical operations essential to a successful election. The need to ‘encourage the participation of women, disabled and youth in all aspects of the electoral process...’ receives special mention.<sup>177</sup>

#### 2.4.2 Americas

One of the most significant events in the Americas in recent years was the adoption of the Inter-American Democratic Charter by the OAS General Assembly at its Special Session in Lima, Peru, on 11 September 2001.<sup>178</sup> The ‘democracy component’ had long been accepted, however. In 1959, the ‘Declaration of Santiago de Chile’ had attempted to set out some of the characteristics of a democratic system, including that ‘the principle of the rule of law must be assured through the separation of powers and review, by judicial

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<sup>175</sup> Available at EISA – Electoral Institute of Southern Africa: [www.eisa.org.za](http://www.eisa.org.za). See also *The Principles for Election Management, Monitoring and Observation in the SADC Region* (PEMMO); SADC Parliamentary Forum, ‘SADC Parliamentary Forum Norms and Standards for Elections in the SADC Region,’ adopted by the SADC Parliamentary Forum Plenary Assembly, 25 March 2001, Windhoek, Namibia. A conference held in November 2005 to review the SADC Parliamentary Forum norms and standards also examined the possibility of developing a legally binding Protocol for Democratic Elections, to take account also of issues such as the equal participation of women and men in the entire electoral process, intra-party democracy, electoral system design, dispute settlement, and election observation methodology and responsibilities: *Communiqué*, Conference on the Review of the Norms and Standards for Elections in the SADC Region, Maputo, 18-20 November 2005. Both SADC Secretariat and SADC PF have sent observation missions to, among others, the 2002 Zimbabwe Presidential Election, the 2002 Lesotho National Assembly Election, the 2000 Mauritius Parliamentary Election, the 2001 Zambia Presidential, Parliamentary, and Local Government Elections, the 2000 Tanzania Presidential and Parliamentary Election, and the 1999 Namibia Presidential and National Assembly Elections; for reports, see <http://www.sadcpf.org>. SADC countries, spearheaded by EISA, have also established an ‘Electoral Commissions Forum’: [www.sadc-ecf.org](http://www.sadc-ecf.org).

<sup>176</sup> SADC Principles and Guidelines Governing Democratic Elections, Part 2.

<sup>177</sup> *Ibid.*, 7.9. In addition to the substantial number of electoral initiatives listed above, EISA has also developed a *Gender Checklist for Free and Fair Elections*, drawing on the standards identified in *Free and Fair Elections*.

<sup>178</sup> For background, see ‘Resolution of San José, Costa Rica, Inter-American Democratic Charter’, adopted at the Fourth Plenary Session, 5 June 2001: AG/RES. 1838 (XXXI-O/01). See also the ‘Declaration of Florida: Delivering the Benefits of Democracy’, adopted at the Fourth Plenary Session, 7 June 2005: AG/DEC. 41(XXXV-O/05).

bodies of the State, of the legality of acts of government’, and that ‘the governments of the American republics must be the result of free elections.’<sup>179</sup>

In 1991, the OAS General Assembly adopted Resolution 1080 on ‘representative democracy’, which it characterized as ‘an indispensable condition for the stability, peace, and development of the region’. This provided a mechanism for collective action, in the case of ‘the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization’s member states’.<sup>180</sup> The following year, the General Assembly approved the ‘Washington Protocol’, which established the possibility to suspend a Member State’s participation if its democratic government were overthrown by force.<sup>181</sup> This was then followed in April 2001 by the adoption of a ‘democracy clause’, which provides that ‘any unconstitutional alteration or interruption of the democratic order in a State of the Hemisphere constitutes an insurmountable obstacle to the participation of that State’s government in the Summits of the Americas process.’<sup>182</sup>

The 2001 Charter, in common with a number of measures adopted in different forums, extends its reach beyond the traditional civil and political rights dimension. Among others, it clearly identifies the linkage between the elimination of extreme poverty and the promotion and consolidation of democracy, and between education and meaningful participation, and calls for measures to defend democracy to be complemented by ‘ongoing and creative work to consolidate democracy as well as a continuing effort to prevent and anticipate the very causes of the problems that affect the democratic system of government.’<sup>183</sup>

The rights aspect to elections and representative democracy is by no means ignored. Indeed, the Charter opens with the affirmation that ‘The peoples of the Americas have a right to democracy and their governments have an obligation to promote and defend it’ (Article 1); that ‘The effective exercise

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<sup>179</sup> ‘Declaration of Santiago de Chile, paras 1, 2; adopted at the 5th Consultative Meeting of Ministers of Foreign Affairs of OAS Member States, *Inter-American System: Treaties, Conventions, and Other Documents*, Washington, D.C., 1981, Vol. 1.

<sup>180</sup> ‘Representative Democracy’, resolution adopted at the Fifth Plenary Session, 5 June 1991: AG/RES. 1080 (XXI-O/91); also ‘Promotion of Democracy’, adopted at the Fourth Plenary Session, 5 June 2001: AG/RES. 1782 (XXXI-O/01).

<sup>181</sup> The Washington Protocol (OAS, Official Documents, OEA/Ser.A/2 Add.3 (SEPF), Series on Treaties 1-E Rev. (1995)) entered into force on 25 September 1997; see now Article 9 of the OAS Charter.

<sup>182</sup> Adopted at the Third Summit of the Americas, Québec City, Canada, 20-22 April 2001. See also Articles 17-22, Inter-American Democratic Charter.

<sup>183</sup> Inter-American Democratic Charter, Preamble, Articles 11-16, 26-28. For a summary of OAS experience leading to adoption of the Charter, see Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Administration of Justice, Rule of Law and Democracy, Working Paper by Manuel Rodríguez Cuadros on measures provided in the various international human rights instruments for the promotion and consolidation of democracy, UN doc. E/CN.4/Sub.2/2001/32, 5 July 2001, paras. 47-58.



of representative democracy is the basis for the rule of law and of the constitutional regimes of the Member States' (Article 2); and that,

'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.'<sup>184</sup>

The Charter sees the strengthening of political parties and other political organizations as a priority (Article 5), and emphasizes that 'It is the right and responsibility of all citizens to participate in decisions relating to their own development...' (Article 6). Discrimination, in particular, should be eliminated:

'The elimination of all forms of discrimination, especially gender, ethnic and race discrimination, as well as diverse forms of intolerance, the promotion and protection of human rights of indigenous peoples and migrants, and respect for ethnic, cultural and religious diversity in the Americas contribute to strengthening democracy and citizen participation.'<sup>185</sup>

While recognizing that Member States are responsible 'for organizing, conducting, and ensuring free and fair electoral processes', the special role for the OAS in providing advisory services or assistance for strengthening and developing electoral institutions and processes is recognized,<sup>186</sup> as is its record in electoral observation.<sup>187</sup>

### 2.4.3 *The Commonwealth*

As noted in 1994, the Commonwealth has been particularly active in election observation, and some forty-six 'Commonwealth Observer Groups' were set up and dispatched between 1990 and 2004.<sup>188</sup> The 'Commonwealth approach' requires both an invitation from the government or election management body,

<sup>184</sup> Inter-American Democratic Charter, Article 3; the content is clearly reflected in Article 1.4 of the draft AU Declaration, noted above.

<sup>185</sup> *Ibid.*, Article 9.

<sup>186</sup> In Haiti, for example, the OAS has supported a large-scale voter registration drive conducted by the Provisional Electoral Council (CEP) in preparation for elections scheduled for late 2005, as part of a collaborative effort with the United Nations Stabilization Mission in Haiti (MINUSTAH).

<sup>187</sup> *Ibid.*, Articles 23-25. The OAS is to ensure that electoral observation missions are effective and independent, and to provide them with the necessary resources. The Charter provides that such missions, 'shall be conducted in an objective, impartial, and transparent manner and with the appropriate technical expertise' (Article 24). Since 1990, the OAS has observed more than 80 elections in South and Central America and the Caribbean; see [www.oas.org](http://www.oas.org).

<sup>188</sup> For election reports, see [www.thecommonwealth.org](http://www.thecommonwealth.org).



and the ‘broad support’ of political parties and civil society.<sup>189</sup> Observers are expected to enjoy freedom of movement and access to all stages of the electoral process, to examine factors ‘impinging on the credibility’ of the process, and to determine whether, in their judgement, ‘the conditions exist for a free expression of will by the electors’, and whether ‘the result of the elections reflects the wishes of the people’.<sup>190</sup> The 1991 Harare Declaration is considered to reflect the fundamental political values of the Commonwealth, to which observers are expected to adhere. The Commonwealth Secretariat nevertheless emphasizes that elections are not to be seen in isolation, but ‘in the context of the democratic process as a whole’.

In common with the OAS and as proposed for the African Union, the Commonwealth has adopted its own version of the ‘democracy clause’. As part of the 1995 Millbrook Action Programme, it was agreed that in the event of a clear deterioration in democratic institutions or a coup d’état affecting a democratically elected government, the Commonwealth was empowered to adopt measures to encourage the restoration of democracy within a reasonable period, including by way of mission or other support for mediation by the Secretary-General. However, if democratic institutions are not restored and a fair and free electoral process instituted within a reasonable time, additional measures may be taken, including suspension of the member State and suspension of technical assistance programmes.

Like other regional and sub-regional organizations, the Commonwealth also seeks to develop and promulgate standards. It organized a Conference of Commonwealth Chief Election Officers in 1998,<sup>191</sup> and a Workshop on Gender and Democracy in Namibia in 2000. Participants in Session Three of the Workshop,

‘urged positive measures to ensure gender balance in the composition of election management bodies and the appointment of senior staff, welcomed the use of quotas by political parties to ensure greater female representation amongst their candidates and overall urged the establishment of ‘woman friendly’ electoral processes; participants had welcomed the idea of Commonwealth research on the relationship between electoral systems and the selection of women candidates.’<sup>192</sup>

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<sup>189</sup> Preliminary assessment missions are generally sent to evaluate whether the essential preconditions for an observer mission in fact exist.

<sup>190</sup> See, for example, the ‘Terms of Reference’ for the Commonwealth Observer Group which was present in Malawi for the May 2004 Parliamentary and Presidential Elections: [www.thecommonwealth.org](http://www.thecommonwealth.org).

<sup>191</sup> See *Voting for Democracy*, 1998, Report of the Conference of Commonwealth Chief Election Officers, Cambridge, United Kingdom, 23-26 March 1998.

<sup>192</sup> See *Gender and Democracy*, 2000, Report of the Commonwealth Workshop on Gender and Democracy, Windhoek, Namibia, 9-11 February 2000. Other recent standard-setting publications of note include *Good Commonwealth Electoral Practice: A Working Document*, 1997; and Michael Pinto-Duschinsky, *Political Financing in the Commonwealth*, London: Commonwealth Secretariat, 2000.

#### 2.4.4 Europe

The 1949 Statute of the Council of Europe recalls the ‘common heritage’ of the peoples of Europe, and the principles of individual freedom, political liberty and the rule of law, ‘which form the basis of all genuine democracy’. The protection of the democratic process through periodic and genuine elections was included in Article 3 of the First Protocol to the European Convention on Human Rights, and has been developed over the years in the jurisprudence of the European Court of Human Rights.<sup>193</sup> In its capacity as a regional international organization, the Council of Europe has also worked to promote democratic processes at national, regional and local level.

Established in 1990, the Venice Commission, or the European Commission for Democracy through Law, to use its full title, advises the Council of Europe on constitutional matters.<sup>194</sup> From its basis within Europe’s constitutional heritage, the Venice Commission aims to uphold the three underlying principles, namely, democracy, human rights and the rule of law. It has been active in electoral matters since its inception, providing opinions on proposed electoral legislation, and contributing to the drafting of electoral laws.<sup>195</sup> In 2002, its role in this field was strengthened by the creation of the Council for Democratic Elections,<sup>196</sup> which gives opinions and makes recommendations on possible improvements to the electoral law and administration in specific countries, based on observation reports by the Parliamentary Assembly and the Congress of Local and Regional Authorities of the Council of Europe.<sup>197</sup> Recent guidelines and studies have focused on

<sup>193</sup> See below, Part 2, *Free and Fair Elections: The Development of International Law and Practice*, sections 2.3.2, 3.1; Wheatley, S., ‘Democracy in International Law: A European Perspective’, 51 *International and Comparative Law Quarterly* 225 (2002); and further below in this Part, section 3.

<sup>194</sup> The Venice Commission was set up in 1990 as a partial agreement of 18 Member States of the Council of Europe. In February 2002 it became an ‘enlarged agreement’, with non-European States able to become full members. According to Article 2 of the revised Statute, the Venice Commission is composed of ‘independent experts who have achieved eminence through their experience in democratic institutions or by their contribution to the enhancement of law and political science’. The members are senior academics, with experience particularly in constitutional or international law, or as supreme or constitutional court judges or members of national parliaments. Members are appointed for four years by the participating countries, and act in a personal capacity. Membership presently includes all Council of Europe Member States. Kyrgyzstan joined in 2004 and Chile in 2005. Belarus is an associate member, and Argentina, Canada, the Holy See, Israel, Japan, Kazakhstan, Mexico, the Republic of Korea, the United States and Uruguay are observers. South Africa has a special cooperation status similar to that of the observers. The European Commission and OSCE/ODIHR participate in the plenary sessions of the Commission.

<sup>195</sup> The Venice Commission co-operates closely with the Office for Democratic Institutions and Human Rights (OSCE/ODIHR), including the provision of joint opinions; see, for example, that on the electoral code of Azerbaijan: COE doc. CDL-AD (2004) 016 rev. See generally <http://www.venice.coe.int>.

<sup>196</sup> The Council for Democratic Elections (CDE) is made up of representatives of the Venice Commission, the Parliamentary Assembly and the Congress of Local and Regional Authorities of Europe.

<sup>197</sup> See, for example, the Venice Commission and Council for Democratic Elections ‘Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report’, adopted by the Venice Commission at its 52nd session (Venice, 18-19 October 2002, Opinion no. 190/2002, ) CDL-AD (2002) 23 rev., Strasbourg, 23 May 2003.

the participation of women in the electoral process,<sup>198</sup> electoral standards,<sup>199</sup> electoral systems,<sup>200</sup> the participation of national minorities in decision-making,<sup>201</sup> remote and electronic voting,<sup>202</sup> election evaluation<sup>203</sup> and election observation.<sup>204</sup>

In its *Code of Good Practice in Electoral Matters*, the Venice Commission recalls that the ‘five principles underlying Europe’s electoral heritage are universal, equal, free, secret and direct suffrage. Furthermore, elections must be held at regular intervals...’ To this hard core – the mainly international rules<sup>205</sup> – it adds ‘the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met.’<sup>206</sup> In its accompanying explanatory report, the Venice Commission notes further that, ‘Where the legislation and practice of different countries converge, the content of the principles can be more accurately pinpointed...’<sup>207</sup> Not only must there be respect for fundamental rights, but also, among others, a stable electoral law, procedural safeguards, including the organization of elections by an impartial body,<sup>208</sup> election observation, an effective system of appeals, efficient organization and operation of polling stations, electoral funding, and security.<sup>209</sup>

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<sup>198</sup> ‘Rapport sur la Recommandation 1676(2004) de l’Assemblée parlementaire relative à la participation des femmes aux élections’, CDL-AD(2005) 002, Strasbourg, 2 June 2005.

<sup>199</sup> See above note 197. Also, ‘Opinion on the Draft ACEEEO Convention on Election Standards, Electoral Rights and Freedoms’, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004, Opinion no. 253/2003) CDL-AD(2004) 010, Strasbourg, 17 March 2004.

<sup>200</sup> ‘Report on Electoral Systems. Overview of Available Solutions and Selection Criteria’, adopted by the Venice Commission at its 57th Plenary Session (Venice, 12-13 December 2003, Study no. 250/2003) CDL-AD(2004) 003, Strasbourg, 4 February 2004.

<sup>201</sup> ‘Report on Electoral Rules and Affirmative Action for National Minorities’ Participation in Decision-Making Process in European Countries’, adopted by the Council for Democratic Elections at its 12th meeting (Venice, 10 March 2005) and the Venice Commission at its 62nd Plenary Session (Venice, 11-12 March 2005).

<sup>202</sup> ‘Report on the Compatibility of Remote Voting and Electronic Voting with the Standards of the Council of Europe’, adopted by the Venice Commission at its 58th Plenary Session (Venice, 12-13 March 2004, Study no. 260/2003), CDL-AD(2004) 012, Strasbourg, 18 March 2004.

<sup>203</sup> ‘Election Evaluation Guide’, adopted by the Council for Democratic Elections at its 5th meeting (Venice, 12 June 2003) and by the Venice Commission at its 55th Plenary Session (Venice, 13-14 June 2003, Opinion No. 235/2003), CDL-AD (2003) 10. Strasbourg, 18 June 2003.

<sup>204</sup> The October 2005 ‘Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers’, prepared by the UN Electoral Assistance Division, the National Democratic Institute, and the Carter Center, featured in draft form in Study no. 325/2004, CDL-EL (2004) 025, Strasbourg, 19 November 2004.

<sup>205</sup> Specifically, Article 25, ICCPR66 and Article 3 ECHR50 Protocol 1.

<sup>206</sup> Above note 197, p. 5.

<sup>207</sup> Ibid.

<sup>208</sup> ‘Only transparency, impartiality and independence from politically motivated manipulation will ensure proper administration of the election process, from the pre-election period to the end of the processing of results.’ Ibid., para. 68.

<sup>209</sup> Ibid., paras. 86-113.

*Electoral systems.* In an extensive review published in December 2003, the Venice Commission noted that,

‘The variety of systems on offer is not only so varied as to be bewildering, it enables almost any result to be obtained, as if the electors’ vote was ultimately less important than the sophistication of those responsible for drawing up electoral legislation.’<sup>210</sup>

The Report understood an ‘electoral system’ to comprise, ‘the set of procedural rules governing the expression of votes cast in a given election and their conversion into seats’,<sup>211</sup> and divided its characterization of those features between ‘factors relating to the organization, the conduct and the process of the election’, on the one hand, and ‘the rules relating to the counting of votes and the distribution of seats’, on the other hand.<sup>212</sup> After a comprehensive review of plurality/majority, proportional representation and hybrid systems, delimitation of electoral districts, methods and number of rounds of voting, vote counting and distribution of seats, the Report considered the rationale for choosing a particular electoral system and looked at what follows from that choice. It identified the three main functions of an electoral system as representation, selection and investiture, where representation in particular is about ‘representation of political opinions, of territories, of specific categories of the electorate..’;<sup>213</sup> while democratic selection to govern through elections raises issues relating to the ‘independence of candidates – and hence of future elected representatives – vis-à-vis the political machine, social fairness in recruitment and the renewal of the elite in power.’<sup>214</sup> The Report detected three major stages in the development of elective democracy, corresponding to ‘three socio-political models for the electoral system: the elitist model, the mass organizations model and the consumerist individuation model...’<sup>215</sup>

Recent work by the Council of Europe itself has reflected these concerns, particularly in relation to systemic problems faced by nation States in working out the principles of representative democratic government at the national level. In *Developing Democracy in Europe: An Analytical Summary of the Council of Europe’s acquis*, Lawrence Pratchett and Vivien Lowndes

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<sup>210</sup> *Report on Electoral Systems – Overview of Available Solutions and Selection Criteria*, above note 200, para. 5.

<sup>211</sup> This definition is taken from Garrone, Pierre, *L’élection populaire en Suisse. Etude des systèmes électoraux et de leur mise en oeuvre sur le plan fédéral et dans les cantons*, Faculté de Droit de Genève, 1991, Basle – Frankfurt am Main, Helbing & Lichtenhahn, Collection genevoise, p. 11. See also Dummett, Michael, *Principles of Electoral Reform*, Oxford: Oxford University Press, 1997; and section 4, below.

<sup>212</sup> *Report on Electoral Systems – Overview of Available Solutions and Selection Criteria*, above note 200, para. 8.

<sup>213</sup> *Ibid.*, para. 89.

<sup>214</sup> *Ibid.*, para. 91.

<sup>215</sup> *Ibid.*, para. 94.

see parliaments, in principle, as representing ‘a microcosm of the full spectrum of socio-economic and political interests found in the wider community’ and as acting ‘as the centre for political debate and deliberation’.<sup>216</sup> The authors note that the Council of Europe has pursued this ideal of representation by supporting ‘the principle of a plurality of political parties as forming the foundation of effective democratic politics’, promoting good practice in electoral matters through defining standards and monitoring procedures, and supporting the development of new instruments to support representation. Within this programme, the Council has also focused on issues such as disenfranchisement among ethnic minorities and gender equality, both of which are seen as being fundamental to democracy.<sup>217</sup> Moreover, the Committee of Ministers of the Council of Europe has recommended that representation of either women or men in any decision-making body in political or public life should not fall below 40 per cent.<sup>218</sup>

A Green Paper on the future of democracy in Europe, commissioned by the Secretary General of the Council of Europe and published in 2004, focused strongly on citizen disaffection and discontent, ‘as reflected in falling voter turnout and rising distrust of political institutions and politicians.’ If these trends were to continue, the authors contend, then, ‘abstention in national parliamentary elections could be as high as 45 per cent in Central and Eastern Europe, and 65 per cent in Western Europe by 2020. This could very well compromise the legitimacy of decisions taken by parliament.’<sup>219</sup> Substantial, rapid and irrevocable changes at the national, regional and global level pose new challenges and opportunities for modern European democracy, affecting both processes and actors. While some of these changes are externally generated, others are intrinsic to democracy; in either case, the question is how to meet these challenges and ‘improve the quality of democratic institutions.’<sup>220</sup> For, as the authors note,

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<sup>216</sup> *Developing Democracy in Europe: An Analytical Summary of the Council of Europe’s acquis*, Lawrence Pratchett and Vivien Lowndes, Strasbourg: Council of Europe, 2004, para. 1, referring also to Parliamentary Assembly Resolution 1264 (2001) on the code of good practice in electoral matters; Committee of Ministers Declaration on the Code of Good Practice in Electoral Matters (13 May 2004); Norris, P., ‘Young people and political activism: from the politics of loyalties to the politics of choice?’, paper given at the Council of Europe symposium ‘Young people and democratic institutions: from disillusionment to participation’, Strasbourg 27-28 November 2003.

<sup>217</sup> *Developing Democracy in Europe*, above note, para. 2.

<sup>218</sup> See Committee of Ministers Recommendation Rec (2003) 3 on balanced participation of women and men in political and public decision making.

<sup>219</sup> *The Future of Democracy in Europe: Trends, Analyses and Reforms*. A Green Paper for the Council of Europe, coordinated by Philippe C. Schmitter and Alexander H. Trechsel and commissioned by the Secretary General of the Council of Europe. Strasbourg: Council of Europe 2004, pp. 5, 26. See also Jackman, R. J. & Ross A. Miller, ‘Voter turnout in industrialized democracies during the 1980s’, *Comparative Political Studies*, Vol. 27, 467-92 (1995); Blais, Andre & A. Dobrzynska, ‘Turnout in electoral democracies’, *European Journal of Political Research*, Vol. 33(2), 239-61 (1998).

<sup>220</sup> *The Future of Democracy in Europe*, above note, p. 15.

‘In the last twenty to thirty years there has been a steady erosion of the scope of democratic decision making... a shift in the balance of public and collective decision making from politics to administration, from democracy to technocracy, *de facto* if not always *de jure* reducing the space for the voice, influence and control of citizens, whether acting directly or indirectly through their representatives...’<sup>221</sup>

At the same time, there is no ‘one ideal type of democracy’, which all European countries should adopt or to which they should all converge.<sup>222</sup> On the contrary, there is likely to be a variety of responses to today’s challenges,<sup>223</sup> and the authors suggest a number of measures which would, among others, treat the citizen with greater respect, promote more political competition, and allow voters to send clearer messages of dissatisfaction than is possible simply by abstention.<sup>224</sup>

*The European Union.* The European Union has taken a number of formal steps to enhance the democratic legitimacy of its various institutions, even as it too reflects in many respects the shift in decision-making from politics to administration. The Charter of Fundamental Rights of the European Union, adopted in 2000, reiterates the basic premises of the Union, namely, that it is ‘founded on the indivisible, universal values of human dignity, freedom, equality and solidarity... [and]... is based on the principles of democracy and the rule of law’.<sup>225</sup> Article 6 of the Treaty on European Union confirms that these are principles ‘common to the Member States’, and proclaims that the Union ‘shall respect fundamental rights, as guaranteed by’ the European Convention on Human Rights.<sup>226</sup> Article 39 of the Charter expressly provides,

- ‘1. Every citizen of the Union has the right to vote and to stand as a candidate at elections to the European Parliament in the Member State in which he or she resides, under the same conditions as nationals of that State.
2. Members of the European Parliament shall be elected by direct universal suffrage in a free and secret ballot.’<sup>227</sup>

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<sup>221</sup> *Ibid.*, p. 61.

<sup>222</sup> *Ibid.*, p. 83.

<sup>223</sup> *Ibid.*, pp. 83-84, on the various possibilities.

<sup>224</sup> *Ibid.*, pp. 87-88.

<sup>225</sup> Charter of Fundamental Rights of the European Union, *OJ*, 364/1, 19 December 2000, Preamble.

<sup>226</sup> See Articles 6(1), 49 Treaty on European Union (TEU). References are to the numbering of the consolidated versions of the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC): European Union, *Consolidated Treaties*, Office for Official Publications of the European Communities, Luxembourg, 1997.

<sup>227</sup> Charter of Fundamental Rights of the European Union, above note 225. Article 40 in turn provides for the right of every EU citizen to vote and stand in municipal elections.

The revised treaties now also include human rights in the accessions process for new Member States,<sup>228</sup> and permit the suspension of a Member State for systematic breaches of human rights.<sup>229</sup> Article 11 of the Treaty integrates an equivalent position of principle into the Union's Common Foreign and Security Council: 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms', and this has led in turn to the EU's involvement in electoral observation, among other democracy-related activities. The European Commission's 'Communication on Election Assistance and Observation', adopted in 2000,<sup>230</sup> identifies the goal of the EU's observation missions as being to assess the degree to which an election is conducted compatibly with international standards. The EU also funds assistance programmes aimed at supporting, among others, national election management bodies, domestic observation and media monitoring, voter education, and organizations involved in electoral support.

*The Organization for Security and Co-operation in Europe (OSCE).* On a number of occasions the IPU has collaborated with the OSCE, particularly the Office for Democratic Institutions and Human Rights (ODIHR). The OSCE's standard-setting instruments, such as the 1990 Copenhagen Document, played a significant and influential role in the elaboration of the Declaration on Criteria for Free and Fair Elections,<sup>231</sup> while ODIHR's 1997 meeting on election observation and election administration contributed much useful information to the study on codes of conduct for elections.<sup>232</sup> Since then, OSCE/ODIHR has maintained a strong focus on election issues, strengthening standards and practices for election observation, and taking up the challenges of new technology.<sup>233</sup> The IPU, in turn, participated substantively in a series of meetings organized by OSCE/ODIHR in preparation for the publication of *Existing Commitments for Democratic Elections in OSCE Participating States*,<sup>234</sup> part of a project to establish an 'inventory of existing election-related norms, commitments, principles, and "good practices".' This report and its accompanying 'doctrine' flesh out the rules, standards and principles identified in earlier work, with the very considerable practice experience gained by the

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<sup>228</sup> Article 49 TEU.

<sup>229</sup> Art. 7 TEU; Art. 309 TEC.

<sup>230</sup> Communication on Election Assistance and Observation (COM (2000) 191).

<sup>231</sup> See below, Part 2, *Free and Fair Elections: The Development of International Law and Practice*, section 2.6.

<sup>232</sup> Goodwin-Gill, G. S., *Codes of Conduct for Elections*, Geneva, IPU, 1998.

<sup>233</sup> For example, the agenda of the April 2005 OSCE Supplementary Human Dimension Meeting, 'Challenges of Election Technologies and Procedures', included a session on the challenges and opportunities of electronic technologies, especially e-voting, for States, election administrators, voters, and election observers. It considered some of the practical problems involved in safeguarding exercise of election principles, such as the secret ballot, and in establishing the credibility of electronic systems. See Final Report, Vienna, 21-22 April 2005, PC.SHDM.GAL/5/05, 12 July 2005.

<sup>234</sup> *Existing Commitments for Democratic Elections in OSCE Participating States*, Warsaw, OSCE/ODIHR, 2003.



OSCE, through its observation of elections and provision of technical assistance and advice. In another directly related area, OSCE/ODIHR is actively engaged in implementing what all OSCE participating States have recognized, namely, that equality between women and men is a fundamental aspect of a just and democratic society, and that this requires equal opportunities for the full participation of women in all aspects of political and public life. The *Handbook for Monitoring Women's Participation in Elections*, published in 2004, offers guidance to all OSCE/ODIHR Election Observation Missions on monitoring women's participation in electoral processes, and sets out a number of practical steps to integrate a gender perspective into their work.<sup>235</sup>

The OSCE's election observation experience, incidentally, extends beyond countries in transition. Its Final Report (5 August 2005) on the United Kingdom of Great Britain and Northern Ireland general election on 5 May 2005, for example, found the election to have been conducted in keeping with 'long-standing tradition' and to have been 'administered in a professional manner and according to well-established procedures that enjoy the overall trust of candidates and voters'. OSCE observers nonetheless detected a number of weaknesses, for example, in regard to postal voting (which had given rise to proven electoral fraud in 2004),<sup>236</sup> the lack of a single, integrated elections law, a number of exceptional variations in constituency delimitation (with implications for equality of the vote), the practice of printing serial numbers on ballots (which could compromise secrecy), and lack of provision for international and domestic non-partisan observers. The OSCE report also recommended that more be done to improve women's access, through party political processes.<sup>237</sup>

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<sup>235</sup> *Handbook for Monitoring Women's Participation in Elections*, Warsaw: OSCE/ODIHR, 2004. As the *Handbook* notes, 'An election cannot possibly fulfil OSCE commitments or meet other international standards unless it includes the opportunity for full and equal participation by women.' *Ibid.*, 6. Other relevant publications include, in 2005, the fifth edition of the OSCE/ODIHR *Election Observation Handbook*, the first edition of which was published in 1996; OSCE/ODIHR notes, while its methodology has not fundamentally changed, the fifth edition benefits from the accumulated experience of having observed more than 150 elections; see also the *Handbook for Domestic Election Observers*, (2003), 'Guidelines to Assist National Minority Participation in the Electoral Process', (2001), 'Guidelines for Reviewing a Legal Framework for Elections', (2001), a report entitled, 'Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System', (2000); and generally at [www.osce.org/odihr/](http://www.osce.org/odihr/).

<sup>236</sup> 'Postal voting abuse', *Guardian*, 27 April 2005, 27; Laville, S., 'Judge slates "banana republic" postal voting system', *Guardian*, 5 April 2005, 1; Kennedy, D., 'Postal votes "undermine faith in democracy"', *Times Online*, 6 August 2005.

<sup>237</sup> This and other election reports are available at <http://www.osce.org/odihr-elections>.



### 3. DEVELOPMENTS IN LAW AND PRACTICE

The original study on the development of international law and practice relating to free and fair elections, which is reproduced below in Part 2, drew on the then emerging legal contribution to electoral rights. Among other characteristics, the international legal obligations of the State with regard to elections were seen to combine elements of *conduct* and *result*. This typology, which can serve a useful analytical purpose and help to determine when breach has occurred, draws on the civil law, in which an obligation of *conduct* is to be understood as ‘une obligation de s’efforcer’, that is, to endeavour or to strive to realize a certain goal or to prevent a certain occurrence.<sup>238</sup> An obligation of *result*, by contrast, is precisely that – an obligation, to borrow Crawford’s words, which involves, ‘in some measure a guarantee of the outcome, whereas obligations of conduct are in the nature of best efforts obligations to do all in one’s power to achieve a result, but without ultimate commitment.’<sup>239</sup>

In the one case, the fact that the result is not achieved is both necessary and sufficient to generate responsibility; in the other, ‘what counts is the violation of the best effort obligation, not the end result generally achieved’.<sup>240</sup> The distinction between obligations of result and obligations of conduct, though having no direct consequences for the question of legal responsibility, is helpful analytically, not least in human rights matters, where *process* (and the adequacy, effectiveness and ultimately legality thereof) is also relevant. Conduct and result overlap; universal suffrage, secret ballot, the right to vote, equality and non-discrimination are matters of result, rather than of conduct, in the sense that the State is obliged to ensure those rights, and not merely to do its best. In the assessment of outcomes, however, such as that the ‘will of the people shall be the basis of the authority of government’, more general standards of conduct come into play; these will include the full spectrum of rules, principles and standards subsumed under the rubric, ‘free and fair elections’. As the study on the development of international law and practice showed, States are bound to a particular outcome, but their precise *legal* responsibility will necessarily depend, first, upon the nature of the obligation contained in the international rule or standard in question; and second, on whether that obligation requires, permits, or encourages, for example, the adoption of local legislation, the institution of an effective *system* for the administration of elections, or a combination of both. Where fundamental political rights are concerned, such as freedom of expression and association, the parameters of the individual

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<sup>238</sup> P-M. Dupuy, ‘Reviewing the difficulties of codification: On Ago’s classification of obligations of means and obligations of result in relation to State responsibility’, 10 *EJIL* 371-86 (1999), 375; thus, the doctor’s duty is to treat the patient to the standard required of doctors, but not specifically to cure.

<sup>239</sup> Crawford, J., ‘Second Report on State Responsibility’, UN doc. A/CN.4/498, 17 March 1999, §57, cited by Dupuy, above note, 378.

<sup>240</sup> Dupuy, above note 238, 379.

right and the range of permissible limitations are generally well-understood. The question here will be whether, on the proper interpretation of a specific treaty obligation, the occurrence of the injury triggers responsibility, account being taken of any ‘margin of appreciation’. In other situations, the question may be pitched at one remove, inquiring whether a particular legal regime as a whole, combining elements of obligation, outcomes, effectiveness, and ‘best practice’, requires States to undertake or refrain from certain measures, in application of the obligation of good faith.<sup>241</sup>

The interplay between different types of obligation operating in the electoral field is apparent in the doctrine of various treaty supervisory bodies. The UN Human Rights Committee, which is responsible for supervising application of the 1966 International Covenant on Civil and Political Rights, has built on its earlier practice,<sup>242</sup> and in 1996 issued General Comment 25 on Article 25, which protects the right to participate in public affairs, the right to vote, and the right of equal access to public service.<sup>243</sup> In relation specifically to the link between elections and representative democracy, paragraph 7 of the General Comment notes:

‘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...’<sup>244</sup>

As the African Commission has observed, it is an ‘inevitable corollary’ of the right to vote for the representative of one’s choice, that the results of the free expression of the will of the voters are respected; otherwise, the right to vote freely is meaningless.<sup>245</sup> At the level of the individual, this means that the right to stand for election implies also the right, once elected, to sit as a member of parliament.<sup>246</sup>

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<sup>241</sup> For further discussion of these and related issues, see Goodwin-Gill, G. S., ‘State Responsibility and the “Good Faith” Obligation in International Law’, in Fitzmaurice, Malgosia & Dan Sarooshi, eds., *Issues of State Responsibility before International Judicial Institutions*, Hart Publishing, 2004, 75-104.

<sup>242</sup> Noted briefly below in Part 2, *Free and Fair Elections: The Development of International Law and Practice*, section 3.1.4.

<sup>243</sup> Human Rights Committee, General Comment 25, 12 July 1996; collected in ‘Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, 167. See also below, Part 2, sections 2.3.1, 3.1.7.

<sup>244</sup> Human Rights Committee, General Comment 25, above note 243.

<sup>245</sup> *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 102/93 (1998), para. 50.

<sup>246</sup> *Sadak and Others v. Turkey (No. 2)*, Fourth Section, 11 June 2002, Judgment; 6 November 2002, Final Judgment, para. 33. See also *Senedores Nacionales de la Provincia del Chaco v. Argentina*, Case 12.135, Report N° 132/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 170 (1999), Election of National Senators for the Province of El Chaco, 19 November 1999.

### 3.1 Elections, democracy and accountability

In the view of the Inter-American Court of Human Rights, there is an inseparable bond between the principle of legality, democratic institutions and the rule of law.<sup>247</sup> The Inter-American Commission on Human Rights has likewise observed that,

‘The participation by citizens in government, which is protected by Article 20 of the [American] Declaration (similar in content to Article 23 of the [American] Convention) forms the basis and underpinning of democracy, which cannot exist without it, because the right to govern rests with the people, who alone are empowered to decide their own and immediate destiny and to designate their legitimate representatives...

The right to political participation allows for a great variety of forms of government. There are many constitutional alternatives in terms of the degree of centralization of state powers or elections and the separation of powers among the organs responsible for the exercise of those powers. Nonetheless, a democratic structure is an essential element for the establishment of a political society where human rights can be fully realized.’<sup>248</sup>

This close relationship between representative democracy and human rights, and ‘the solidarity of the American states and the high aims of the Charter require a form of political organization based on the *effective exercise of representative democracy*’.<sup>249</sup> Political participation or popular government is thus seen as a ‘distinct right’.<sup>250</sup>

The doctrine of the European Court of Human Rights is similar. In *United Communist Party of Turkey and Others v. Turkey*, the Court reiterated that,

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<sup>247</sup> See Inter-American Court of Human Rights, *The Word ‘Laws’ in Article 30 of the American Convention on Human Rights*, Advisory Opinion OC-6/86, 9 May 1986, Series A N° 6, para. 32; also *Judicial Guarantees in States of Emergency (Articles 27(2), 25, and 8 of the American Convention on Human Rights)*, Advisory Opinion OC-9/87, 6 October 1987, Series A N° 9, para. 24.

<sup>248</sup> Inter-American Commission on Human Rights, Report N° 48/00, Case 11.166, *Walter Humberto Vásquez Vejarano v. Peru*, 13 April 2000, para. 93 (referring to *Doctrine of the Inter-American Commission on Human Rights (1971-1981)*, in *Ten Years of Activities 1971-1981*, Washington, D.C., 1982, p. 334.

<sup>249</sup> *Andres Aylwin Azocar et al v. Chile*, Report N° 137/99, Case 11,863, 27 December 1999, para. 31: IACHR *Annual Report for 1999*.

<sup>250</sup> *Ibid.*, para. 31, note 5. The Commission cited former member Michael Reisman for the view that, in so far as the Universal Declaration of Human Rights identifies the will of the people as the basis of the authority of government, when the right to democratic government is violated, ‘all the other human rights that depend on the lawful institutions of government become matters for the discretion of dictators... Violations of the right to popular government are not secondary or less important. They are very, very serious human rights violations’: W. Michael Reisman, ‘Humanitarian Intervention and Fledgling Democracies’, 18 *Fordham Int. L.J.* 794, 795 (1995).

‘Democracy is without doubt a fundamental feature of the European public order... That is apparent, firstly, from the Preamble to the Convention, which establishes a very clear connection between the Convention and democracy by stating that the maintenance and further realisation of human rights and fundamental freedoms are best ensured on the one hand by an effective political democracy and on the other by a common understanding and observance of human rights ... The Preamble goes on to affirm that European countries have a common heritage of political traditions, ideals, freedom and the rule of law. The Court has observed that in that common heritage are to be found the underlying values of the Convention ...; it has pointed out several times that the Convention was designed to maintain and promote the ideals and values of a democratic society...’<sup>251</sup>

In the view of the Human Rights Committee, ‘genuine’ periodic elections in accordance with Article 25(b), ‘are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them.’<sup>252</sup> The Inter-American Commission in turn considers that it is empowered,

‘to verify, with respect to these rights, whether the holding of periodic, genuine elections, with universal, equal, and secret suffrage takes place within the framework of the necessary guarantees so that the results represent the popular will, including the possibility that the voters could, if necessary, effectively take appeal of an electoral process that they consider fraudulent, defective, and irregular or that ignores the right to access, under general conditions of equality, to the public functions of their country.’<sup>253</sup>

Moreover, ‘the link between voters and the persons elected, and genuine representation, can only be attained through mechanisms that assure the most free and ample participation of the citizens.’ This, in turn, is the explanation for ‘universal suffrage with no exclusions or restrictions based on sex, social or economic status, or privileges.’<sup>254</sup>

The African Commission on Human and Peoples’ Rights has likewise recognized the consequences of free and fair elections. In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, it had to consider the annulment of the June 1993 elections and the ousting of the jurisdiction of the courts by the Federal Military Government. The Commission expressly noted that both foreign and local observers had found the elections to have

<sup>251</sup> *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Judgment, para. 45.

<sup>252</sup> Human Rights Committee, General Comment 25, para. 9.

<sup>253</sup> *Andres Aylwin Azocar et al v Chile*, Report N° 137/99, Case 11,863, 27 December 1999, para. 47: IACHR *Annual Report for 1999*; see also paras. 53-55, quoting extensively from the IPU’s Universal Declaration on Democracy.

<sup>254</sup> *Ibid.*, para. 95.

been free and fair, while the government had been unable to give any explanation of alleged irregularities.<sup>255</sup>

‘A basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards. The criteria for what constitutes free and fair elections are internationally agreed upon, and international observers are put in place to apply these criteria. It would be contrary to the logic of international law if a national government with a vested interest in the outcome of an election, were the final arbiter of whether the election took place in accordance with international standards. In the case the government does not even attempt to defend its decision to overrule the judgement of international observers.’<sup>256</sup>

### 3.2 Democracy, representation, and electoral systems

The Human Rights Committee has noted that the Covenant does not impose any particular electoral system, merely that,

‘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.’<sup>257</sup>

This somewhat delphic utterance leaves many questions begging. Increasing attention is now being given precisely to the issue of *representation*, and to securing full, popular participation in elections and the democratic process. Moreover, certain electoral systems, such as ‘first past the post’, systemically diminish the value of certain votes in certain constituencies and can produce ‘unrepresentative’ legislatures and unaccountable governments.<sup>258</sup> In due course, it may be that neither Article 25 nor the free expression of the will of the people is satisfied by crude majoritarianism, or by the ‘political’ exclusion of certain categories of the population.

<sup>255</sup> *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, African Commission on Human and Peoples’ Rights, Comm. No. 102/93 (1998), para. 47: ‘The government acknowledges that international observers of the elections, applying international standards, judged them to be free and fair. Yet it discounted the judgement of these international observers and substituted its own, unsupported, judgement.’

<sup>256</sup> *Ibid.*, para. 48.

<sup>257</sup> Human Rights Committee, General Comment 25, para. 21.

<sup>258</sup> This can also have a prejudicial impact on women’s participation; see *Gender and political participation*, London: Electoral Commission, April 2004, the product of research by Pippa Norris, Joni Lovenduski and Rosie Campbell; they found, among others, that ‘the presence of women as representatives increases women’s activism’, that having more women representatives may encourage greater participation, and that this could be assisted by strategies to increase the number of women being selected and standing for election. See generally [www.electoralcommission.org.uk](http://www.electoralcommission.org.uk).

The European Court of Human Rights, for example, has asserted its role of ensuring also that ‘effective political democracy’ is properly served in the territories to which the Convention applies. To this end, it has reviewed the competence of the various institutions of the European Union, and concluded that, while the European Parliament has no formal right to initiate legislation, it has the right to request the European Commission to submit proposals on matters on which it considers that a Community act is required. This led the Court to conclude,

‘that the European Parliament represents the principal form of democratic, political accountability in the Community system. The Court considers that whatever its limitations, the European Parliament, which derives democratic legitimation from the direct elections by universal suffrage, must be seen as that part of the European Community structure which best reflects concerns as to “effective political democracy”.’

Although States have a wide margin of appreciation in their choice of electoral system, the Court held that to accept the United Kingdom Government’s contention that the sphere of activities of the European Parliament falls outside the scope of Article 3 of Protocol No. 1 ‘would risk undermining one of the fundamental tools by which “effective political democracy” can be maintained.’<sup>259</sup> The applicant in this case, a resident of Gibraltar, had been completely denied any opportunity to express her opinion in the choice of the members of the European Parliament: ‘the very essence of the applicant’s right to vote... was denied.’<sup>260</sup>

The strength of the presumption of democratic inclusion is illustrated again by the case of *Aziz v. Cyprus*. Article 63 of the 1960 Cypriot Constitution provided for two separate electoral lists, one for the Greek-Cypriot community and one for the Turkish-Cypriot community. The participation of the Turkish-Cypriot members of Parliament was suspended as a result of the ‘anomalous situation’ which began in 1963. At this time and thereafter, it became impossible to implement the relevant constitutional provisions governing parliamentary representation of the Turkish-Cypriot community and community quotas.<sup>261</sup> In domestic proceedings, the Supreme Court of Cyprus held that Article 63 of the Constitution and Article 5 of Law No. 72/79 (relating to the election of Members of Parliament), ‘did not provide for members of the Turkish-Cypriot

<sup>259</sup> *Mathews v United Kingdom*, 18 February 1999, Judgment, para. 43.

<sup>260</sup> *Ibid.*, paras. 64, 65. The Court noted that even though Gibraltar is excluded from certain areas of Community activity, in other significant areas such activity nonetheless has a direct impact. The European Parliament was sufficiently involved in specific legislative processes and in the general democratic supervision of the activities of the European Community, ‘to constitute part of the “legislature” of Gibraltar for the purposes of Article 3 of Protocol No. 1’: *ibid.*, paras. 53, 54.

<sup>261</sup> *Aziz v. Cyprus* Second Section, 22 June 2004, Judgment; 22 September 2004, Final Judgment.

community living in the Government-controlled part of Cyprus to vote in the parliamentary elections.<sup>262</sup> The Supreme Court considered further that it could not intervene on the basis of the law of necessity in order to fill the legislative gap in this respect.

The European Court of Human Rights accepted that ‘States enjoy considerable latitude to establish rules within their constitutional order governing parliamentary elections and the composition of the Parliament, and that the relevant criteria may vary according to the historical and political factors peculiar to each State.’ However, the rules should not be such as to ‘exclude some persons or groups of persons from participating in the political life of the country and, in particular, in the choice of the legislature, a right guaranteed by both the Convention and the Constitutions of all Contracting States.’<sup>263</sup>

Because the relevant constitutional provisions had been rendered ineffective and there was no legislation to deal with the resulting problems, ‘the applicant, as a member of the Turkish-Cypriot community living in the Government-controlled area of Cyprus, was completely deprived of any opportunity to express his opinion in the choice of the members of the House of Representatives of the country of which he is a national and where he has always lived.’<sup>264</sup> There had consequently been a violation of Article 3 of the First Protocol. In addition, the applicant had suffered ‘a clear inequality of treatment in the enjoyment of the right in question, which must be considered a fundamental aspect of the case.’<sup>265</sup> There had accordingly been a violation of Article 14 (the non-discrimination provision) in conjunction with Article 3.

‘The Court notes that the applicant was a Cypriot national, resident in the Government-controlled area of Cyprus... [and]... the difference in treatment in the present case resulted from the very fact that the applicant was a Turkish Cypriot. It emanated from the constitutional provisions regulating the voting rights between members of the Greek-Cypriot and Turkish-Cypriot communities that had become impossible to implement in practice.’<sup>266</sup>

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<sup>262</sup> Ibid., para. 27.

<sup>263</sup> Ibid., para. 28. As McLachlin C.J. stated in *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519, para. 41: ‘The government’s novel political theory that would permit elected representatives to disenfranchise a segment of the population finds no place in a democracy built upon principles of inclusiveness, equality, and citizen participation.’

<sup>264</sup> *Aziz v. Cyprus* Second Section, 22 June 2004, Judgment; 22 September 2004, Final Judgment, para. 29.

<sup>265</sup> Ibid., para. 38.

<sup>266</sup> Ibid., para. 36.



This difference could not be justified on reasonable and objective grounds, ‘particularly in the light of the fact that Turkish Cypriots in the applicant’s situation are prevented from voting at any parliamentary election.’<sup>267</sup>

### 3.3 Political parties and political rights

The significant role now played by political parties and party membership in public affairs and the election process is increasingly acknowledged. This raises issues not only in the field of freedom of expression and freedom of association, but also in regard to the relationship between parties, members, and candidates. In the view of the Human Rights Committee, ‘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.’<sup>268</sup>

The Inter-American Commission also has recognized that ‘parties are institutions needed in democracy’. Where they have the exclusive right to present candidates, however, review procedures must be available to ensure the adequate protection of political rights.<sup>269</sup> In *United Communist Party of Turkey and Others v. Turkey*, the European Court of Human Rights observed that,

‘In addition, Articles 8, 9, 10 and 11 of the Convention require that interference with the exercise of the rights they enshrine must be assessed by the yardstick of what is “necessary in a democratic society”. The only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from “democratic society”. Democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it...’<sup>270</sup>

Where political parties are concerned, only convincing and compelling reasons can justify restrictions on their freedom of association, and Contracting States have only a limited margin of appreciation in determining whether a necessity within the meaning of Article 11 § 2 exists.<sup>271</sup> In *Refah Partisi (The Welfare Party) and Others v. Turkey*, the Grand Chamber referred to its views in *United Community Party and Others v. Turkey*, and stated that it found even more persuasive than the wording of Article 11 the fact that political parties were a form of association essential to the proper functioning of democracy. In view

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<sup>267</sup> *Ibid.*, para. 37.

<sup>268</sup> Human Rights Committee, General Comment 25, para. 26.

<sup>269</sup> *Whitbeck v. Guatemala*, Report No. 21/94, Case 10.804 (b), 22 September 1994, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.88 rev. 1 Doc. 9 at 46 (1995).

<sup>270</sup> *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, Judgment, para. 45.

<sup>271</sup> *Ibid.*, para. 46.



of the role played by political parties, any measure taken against them affected both freedom of association and, consequently, democracy in the State concerned. Political parties occupy a special place in the democratic equation:

‘It is in the nature of the role they play that political parties, the only bodies which can come to power, also have the capacity to influence the whole of the regime in their countries. By the proposals for an overall societal model which they put before the electorate and by their capacity to implement those proposals once they come to power, political parties differ from other organisations which intervene in the political arena...

[The] protection of opinions and the freedom to express them within the meaning of Article 10 of the Convention is one of the objectives of the freedoms of assembly and association enshrined in Article 11. That applies all the more in relation to political parties in view of their essential role in ensuring pluralism and the proper functioning of democracy...

The Court considers that there can be no democracy without pluralism.’<sup>272</sup>

However, the Court also gave weight to the principle of secularism, finding that the State might impose restrictions on participation by civil servants in fundamentalist activities and that universities might likewise ‘regulate manifestation of the rites and symbols’ of certain fundamentalist religious movements.<sup>273</sup>

‘The freedoms guaranteed by Article 11, and by Articles 9 and 10 of the Convention, cannot deprive the authorities of a State in which an association, through its activities, jeopardises that State’s institutions, of the right to protect those institutions.’<sup>274</sup>

What is more, political organizations must follow the rules of the game, if they are to enjoy the protection of the Convention. Quoting again from its judgment in *United Communist Party*, the Court repeated:

‘... one of the principal characteristics of democracy [is] the possibility it offers of resolving a country’s problems through dialogue, without recourse to violence, even when they are irksome. Democracy thrives on freedom of expression. From that point of view, there can be no justification for hindering a political group solely because it seeks to debate in public the situation of part of the State’s population and to take part in the nation’s political life in order to find, according to democratic rules, solutions capable of satisfying everyone concerned.’<sup>275</sup>

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<sup>272</sup> *Refah Partisi (The Welfare Party) and Others v. Turkey*, 13 February 2003, Judgment, paras. 87, 88, 89.

<sup>273</sup> *Ibid.*, paras. 94-5.

<sup>274</sup> *Ibid.*, para. 96.

<sup>275</sup> *Ibid.*, para. 97.

A political party may promote a change in the law or the legal and constitutional structures of the State on two conditions:

‘firstly, the means used to that end must be legal and democratic; secondly, the change proposed must itself be compatible with fundamental democratic principles. It necessarily follows that a political party whose leaders incite to violence or put forward a policy which fails to respect democracy or which is aimed at the destruction of democracy and the flouting of the rights and freedoms recognised in a democracy cannot lay claim to the Convention’s protection against penalties imposed on those grounds...

... In view of the very clear link between the Convention and democracy... no one must be authorised to rely on the Convention’s provisions in order to weaken or destroy the ideals and values of a democratic society. Pluralism and democracy are based on a compromise that requires various concessions by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole...

Drastic measures, such as the dissolution of an entire political party and a disability barring its leaders from carrying on any similar activity for a specified period, may be taken only in the most serious cases... Provided that it satisfies the conditions set out in paragraph 98 above, a political party animated by the moral values imposed by a religion cannot be regarded as intrinsically inimical to the fundamental principles of democracy, as set forth in the Convention.<sup>276</sup>

The Court agreed with the Chamber’s conclusion that the ‘plurality of legal systems’ proposed by *Refah* could not be considered compatible with the Convention system, for it would ‘introduce into all legal relationships a distinction between individuals grounded on religion, would categorise everyone according to his religious beliefs and would allow him rights and freedoms not as an individual but according to his allegiance to a religious movement.’<sup>277</sup> It agreed further that *sharia* is incompatible with the fundamental principles of democracy, and concluded that,

‘there were convincing and compelling reasons justifying *Refah’s* dissolution and the temporary forfeiture of certain political rights imposed on the other applicants... [and]... those interferences met a “pressing social need” and were “proportionate to the aims pursued”. It follows that *Refah’s* dissolution may be regarded as “necessary in a democratic society” within the meaning of Article 11 § 2.’<sup>278</sup>

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<sup>276</sup> *Ibid.*, para. 98.

<sup>277</sup> *Ibid.*, para. 119.

<sup>278</sup> *Ibid.*, paras. 123, 135.

The facts and the reasoning in this case illustrate the balance which needs to be made from time to time. The *effective* exercise of the right to vote further requires freedom of expression, assembly and association – ‘essential conditions’, in the view of the Human Rights Committee, which must be fully protected.<sup>279</sup> In the *Bowman* case in 1998, the European Court of Human Rights stressed the critical importance of related political rights:

‘Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system... The two rights are inter-related and operate to reinforce each other... freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature”...’

And, as the same Court recalled in *Sadak and Others v. Turkey (No. 2)* in 2002,

‘... [w]hile freedom of expression is important for everybody, it is especially so for an elected representative of the people. He represents his electorate, draws attention to their preoccupations and defends their interests. Accordingly, interferences with the freedom of expression of an opposition member of parliament ... call for the closest scrutiny on the part of the Court (see *Castells v. Spain*, judgment of 23 April 1992, Series A no. 236, pp. 22-23, § 42).’<sup>280</sup>

The *effective* implementation of the right and opportunity to stand for elective office entails ‘a free choice of candidates’, and again, any restrictions on standing for election must be objective and reasonable.<sup>281</sup> In *Rios Montt v. Guatemala*, for example, the Inter-American Commission on Human Rights upheld the constitutional ‘ineligibility of those who lead movements of governments that breach the constitutional order’.<sup>282</sup>

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<sup>279</sup> Human Rights Committee, General Comment 25, para. 12. The Committee calls attention to some of the positive measures which may be required to overcome specific difficulties, such as illiteracy, language, poverty and impediments to free movement. It also emphasizes that full enjoyment of Article 25 rights requires ‘the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives...’ Ibid., para. 25.

<sup>280</sup> *Sadak and Others v. Turkey (No. 2)*, Fourth Section, 11 June 2002, Judgment; 6 November 2002, Final Judgment, para. 34.

<sup>281</sup> Human Rights Committee, General Comment 25, paras. 15-18.

<sup>282</sup> *Rios Montt v. Guatemala*, Report N° 30/93, Case 10.804, 12 October 1993, *Annual Report of the Inter-American Commission on Human Rights* 1999.

### 3.4 The right to vote

Like eligibility to stand for election, the right to vote may be subject only to reasonable restrictions,<sup>283</sup> and States must ‘take effective measures to ensure that all persons entitled to vote are able to exercise that right.’<sup>284</sup> In the *Gitonas* case in 1997, the European Court of Human Rights repeated the view expressed in *Mathieu-Mohin and Clerfayt v. Belgium* that, although Article 3 of the First Protocol implies subjective rights to vote and stand for election, these rights are not absolute. States may subject them to conditions, although,

‘it is for the Court to determine in the last resort whether the requirements of [the First Protocol] have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.’<sup>285</sup>

The Court applied the same principles in *Py v. France* in 2005, finding that having to satisfy a residence or length of residence requirement is not an arbitrary restriction of the right to vote, and that, in effect, a measure intended to ensure that ballots reflect the will of the population ‘concerned’ (and not be affected by mass voting by recent arrivals without strong ties to the territory in question) was not in itself unreasonable.<sup>286</sup> The Human Rights Committee came to the same conclusion in a broadly similar application.<sup>287</sup>

On the other hand, in *Melnychenko v. Ukraine* in 2005, the applicant, a refugee from Ukraine, alleged that his right to stand for election had been infringed, in so far as his candidacy had been refused by the Electoral Commission, even though he still held a valid registered place of legal residence.<sup>288</sup> In a judgment of importance for refugees and the displaced, the Court noted that a residence requirement *for voting* could be justified on the following grounds:

‘(1) the assumption that a non-resident citizen is less directly or continuously concerned with, and has less knowledge of, a country’s day-to-day problems;

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<sup>283</sup> Human Rights Committee, General Comment 25, para. 10; see also para. 14 (proportionality).

<sup>284</sup> *Ibid.*, para. 11.

<sup>285</sup> *Gitonas and Others v. Greece*, 1 July 1997, Judgment (Merits), Court (Chamber), para. 39. There may thus be differences between States in relation to the status of parliamentarians, provided always they guarantee the expression of the will of the people through free, fair and regular elections.

<sup>286</sup> *Py v. France*, 11 January 2005, Judgment, paras. 48, 50-51, 56. The case involved rules governing referenda held and to be held in the French overseas territory of New Caledonia.

<sup>287</sup> *Marie-Hélène Gillot v. France*, Human Rights Committee, Communication No. 932/2000, UN doc. A/57/40 at 270 (2002).

<sup>288</sup> *Melnychenko v. Ukraine*, 19 October 2004, Judgment; 30 March 2005, Final Judgment.

(2) the impracticability for and sometimes undesirability (in some cases impossibility) of parliamentary candidates presenting the different electoral issues to citizens living abroad so as to secure the free expression of opinion; (3) the influence of resident citizens on the selection of candidates and on the formulation of their electoral programmes, and (4) the correlation between one's right to vote in parliamentary elections and being directly affected by the acts of the political bodies so elected...'<sup>289</sup>

However, the Court accepted that stricter requirements could be applied in the case of eligibility *to stand for election* to parliament; a five-year continuous residency requirement would not be ruled out, as it could be considered appropriate so as to enable potential candidates 'to acquire sufficient knowledge of the issues associated with the national parliament's tasks.'<sup>290</sup> In addition, in the Court's view,

'... it is essential that parliamentary candidates are shown to be persons of integrity and truthfulness. By obliging them to put themselves forward publicly, in a full and frank manner, the electorate can assess the candidate's personal qualifications and ability to best represent its interests in parliament. Such requirements clearly correspond to the interests of a democratic society and States have a margin of appreciation in their application.'<sup>291</sup>

With regard to the participation of refugees in elections in their country of origin, the Court referred with approval to the UN Human Rights Committee's General Comment 25 (1996) on Article 25 of the International Covenant on Civil and Political Rights.<sup>292</sup> While this Article prohibited arbitrary discrimination between citizens, a registration requirement, itself dependent on residence, would be justifiable, and States do have a right to limit voting in general to those citizens habitually resident in their territory. The Human Rights Committee commented further:

'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. No person should

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<sup>289</sup> Ibid., para. 56.

<sup>290</sup> Ibid., para. 57.

<sup>291</sup> Ibid., para. 58.

<sup>292</sup> Ibid., para. 28.

suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.<sup>293</sup>

The Court also relied on the Venice Commission's *Code of Good Practice in Electoral Matters*, which provides:

'The freedom of movement of citizens within the country, together with their right to return at any time, is one of the fundamental rights necessary for truly democratic elections. If persons, in exceptional cases, have been displaced against their will, they should, provisionally, have the possibility of being considered as resident at their former place of residence.'<sup>294</sup>

The European Court of Human Rights concluded:

'The right to stand as a candidate in an election, which is guaranteed by Article 3 of Protocol No. 1 and is inherent in the concept of a truly democratic regime, would be illusory if one could be arbitrarily deprived of it at any moment. Consequently, while it is true that States have a wide margin of appreciation when establishing eligibility conditions in the abstract, the principle that rights must be effective requires that the eligibility procedure contains sufficient safeguards to prevent arbitrary decisions.'<sup>295</sup>

In the circumstances, the Central Election Commission's refusal of the applicant's candidacy while he still held a valid registered place of legal residence had violated his right to stand for election.

In *Hirst v. The United Kingdom (No. 2)*, the applicant successfully challenged his denial of the right to vote on the ground of criminal conviction.<sup>296</sup> The European Court of Human Rights again invoked the Human Rights

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<sup>293</sup> Human Rights Committee, General Comment 25, para. 15

<sup>294</sup> Venice Commission, *Code of Good Practice in Electoral Matters*, 15.

<sup>295</sup> *Melnychenko v. Ukraine*, 19 October 2004, Judgment; 30 March 2005, Final Judgment, para. 59. Generally on the electoral rights of refugees and the displaced, see Mooney E. & Jarrah, B., 'Displaced and Disenfranchised: Internally Displaced Persons and Elections in the OSCE Region', 4 *Ethnopolitics* 29 (2005); Roberts, Hannah, 'Forced migration and electoral participation', Forced Migration Online (FMO) Research Guide, October 2003; Lacy, B., 'Internally Displaced Persons, and the Right to Political Participation', International Foundation for Electoral Systems, 2004; Grace, J., 'The Electoral Rights of Conflict Forced Migrants: A Review of Relevant Legal Norms and Instruments', International Organization for Migration, Participatory Elections Project (PEP), Discussion Paper No. 1, June 2003; Grace, J. & Fischer, J., 'Enfranchising Conflict-Forced Migrants: Issues, Standards, and Best Practices', International Organization for Migration, Participatory Elections Project (PEP), Discussion Paper No. 2, 2003.

<sup>296</sup> *Hirst v. The United Kingdom (No. 2)*, Fourth Section, 30 March 2004, Judgment; this case was referred to and confirmed by the Grand Chamber in its judgment of 6 October 2005.

Committee's General Comment No. 25, referred to the European Prison Rules, and brought in aid the Venice Commission's *Code of Good Practice in Electoral Matters*,<sup>297</sup> as well as the decision of the Canadian Supreme Court in *Sauvé v. Canada*, which it considered to provide a detailed and helpful examination of the purposes pursued by prisoner disenfranchisement.<sup>298</sup>

Recalling its earlier pronouncements on democratic values and the role of elected representatives, the Fourth Section was of the view that,

'The right to vote for those elected representatives must also be acknowledged as being the indispensable foundation of a democratic system. Any devaluation or weakening of that right threatens to undermine that system and it should not be lightly or casually removed.'<sup>299</sup>

In the words of the Grand Chamber, 'the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.'<sup>300</sup> For the right to vote is not a privilege, and in a democratic State, the presumption must be in favour of inclusion.<sup>301</sup>

'Any departure from the principle of universal suffrage risks undermining the democratic validity of the legislature thus elected and the laws which it promulgates. Exclusion of any groups or categories of the general population must accordingly be reconciled with the underlying purposes of Article 3 of Protocol No. 1.'<sup>302</sup>

The Court and the Fourth Section both noted that there was considerable variation in the practice of States. Applying the established criteria of legitimate aim and proportionality, the Court noted that loss of the right to vote was not part of the sentencing process in criminal cases in the United Kingdom. So far as the 'purpose of enhancing civic responsibility and respect for the rule

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<sup>297</sup> *Hirst v. The United Kingdom (No. 2)*, Fourth Section, paras. 22-24; Grand Chamber, paras. 26-32.

<sup>298</sup> *Sauvé v. Canada (Chief Electoral Officer)* [2002] 3 SCR 519. The Supreme Court of Canada held by five votes to four that section 51(e) of the Canada Elections Act 1985, which denied the right to vote to every person imprisoned in a correctional institution serving a sentence of two years or more, was unconstitutional, in that it infringed Articles 1 and 3 of the Canadian Charter of Rights and Freedoms, which provide: '1. The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society', and '3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.' The Supreme Court itself also referred to the jurisprudence of the European Court of Human Rights; see paras. 129, 132.

<sup>299</sup> *Hirst v. The United Kingdom (No. 2)*, Fourth Section, 30 March 2004, Judgment, para. 41.

<sup>300</sup> *Hirst v. The United Kingdom (No. 2)*, Grand Chamber, 6 October 2005, Judgment, para. 58.

<sup>301</sup> *Ibid.*, para. 59.

<sup>302</sup> *Ibid.*, para. 62.

of law’ was concerned, the Court could see ‘no clear, logical link between the loss of vote and the imposition of a prison sentence, where no bar applies to a person guilty of crimes which may be equally anti-social or “uncitizen-like” but whose crime is not met by such a consequence.’ Nevertheless, given the variety of political and penal philosophies and policies, it could not be said that these aims were not legitimate, and the decision turned rather on the issue of proportionality.<sup>303</sup>

Although the policy of prisoner disenfranchisement was applied with some differentiation in the United Kingdom, affecting only those convicted of crimes sufficiently serious to warrant an immediate custodial sentence, it nevertheless had the effect of removing the right to vote from a substantial number of persons in an indiscriminate manner, irrespective of length of sentence and the nature or gravity of the offence.<sup>304</sup> There was no evidence that Parliament in the United Kingdom had ever sought to weigh the competing interests or to assess the proportionality of the ban as it affects convicted prisoners. The Court was not prepared to accept that an absolute bar on voting by any serving prisoner in any circumstances falls within an acceptable margin of appreciation. In the circumstances, Article 3 of the First Protocol had therefore been breached.

### 3.5 Elections and equality

In a number of jurisdictions, the principles of equality and participation have been used to demonstrate the inequity and unlawfulness of certain decisions relating to systems. In *Azocar v. Chile*, for example, the Inter-American Commission on Human Rights found that by establishing so-called ‘designated senators’ and senator-for-life Augusto Pinochet, ‘the human rights to political participation and to equality without discrimination as set forth in the American Convention (Articles 23 and 24) have been violated...’<sup>305</sup> The African Commission adopted similar reasoning when reviewing a Zambian constitutional amendment seeking to limit political participation to persons who could show that both their parents are or were Zambians by birth or

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<sup>303</sup> *Hirst v. The United Kingdom (No. 2)*, Fourth Section, 30 March 2004, Judgment, paras. 45-47; Grand Chamber, 6 October 2005, Judgment, paras. 60-62.

<sup>304</sup> *Hirst v. The United Kingdom (No. 2)*, Fourth Section, 30 March 2004, Judgment, para. 48; Grand Chamber, 6 October 2005, paras. 63-71, 76-85.

<sup>305</sup> *Andres Aylwin Azocar et al v. Chile*, Report N° 137/99, Case 11,863, 27 December 1999, para. 5: IACHR *Annual Report for 1999*. See also Inter-American Commission on Human Rights, *Statehood Solidarity Committee v United States*, Case 11.204, Report No. 98/03, OEA/Ser./L/V/II.114 Doc. 70 rev. 1 at 725 (2003), 29 December 2003, in which the petitioners, residents of the District of Columbia (Washington, D.C.) argued that, by reason of Article 1.8 of the United States Constitution, they were denied representation in their country’s government through freely-elected representatives.



descent.<sup>306</sup> The Commission stressed the importance of equality and non-discrimination in the African Charter, finding even that the ‘popular will’ cannot be used to justify limitations on the responsibilities assumed by States.<sup>307</sup> The requirement of equality has also been applied by the Human Rights Committee in the different context of constituency delimitation. In *Istvan Mátyus v. Slovakia*, it endorsed the finding of a violation of Article 25 ICCPR<sup>66</sup> when election districts for the same municipal council were drawn with substantial differences between the number of inhabitants per elected representative.<sup>308</sup>

### 3.5.1 *The participation of women in political life*

Not surprisingly, ‘equality’ is also the driving force behind the promotion of the political participation of women, both in the political forums reviewed above, and as a matter of law. Article 7 of the Convention on the Elimination of All Forms of Discrimination against Women requires States to ‘take all appropriate measures to eliminate discrimination against women in the political and public life of the country’, to ‘ensure to women, on equal terms with men, the right to vote in all elections’, and to be eligible for election, to participate in the formulation and implementation of government policy, and to hold public office and perform public functions at all levels.<sup>309</sup> The fact is, however, that women remain seriously under-represented in political and public life, notwithstanding the formal trappings of equality. Experience in certain regions suggests that the balance is most likely to change, where numerical goals or quotas are applied. The Inter-American Commission on Human Rights, for example, reported that the proportion of women elected to Congress in Argentina increased to approximately 30 per cent with the adoption of a national law on quotas, with increases also recorded in other countries implementing such measures.<sup>310</sup> Legislation on quotas generally entails the possibility of

<sup>306</sup> *Legal Resources Foundation v. Zambia*, African Commission on Human and Peoples’ Rights, Comm. No. 211/98 (2001).

<sup>307</sup> *Ibid.*, paras. 63-72.

<sup>308</sup> *Istvan Mátyus v. Slovakia*, Human Rights Committee, Communication No. 923/2000, UN doc. A/57/40 (Vol. II) at 257 (2002).

<sup>309</sup> Under Article 8, States parties undertake to recognize the right of women, on equal terms with men, ‘to represent their Government at the international level and to participate in the work of international organizations.’ See Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 23 (16th session, 1997), ‘Article 7 – Political and public life’, in ‘Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies’, UN doc. HRI/GEN/1/Rev.7, 12 May 2004, 263. In addition to universal and regional human rights instruments, see Convention on the Political Rights of Women 1953; the Vienna Declaration 1993; paragraph 13 of the Beijing Declaration and Platform for Action 1995; European Union Council recommendation on balanced participation of women and men in decision-making (1996); and European Commission, ‘How to Create a Gender Balance in Political Decision-Making’ (1996).

<sup>310</sup> *Annual Report of the IACHR 1999*, OEA/Ser.L/V/II.106, Doc. 6 rev., 13 April 1999, Ch. VI, ‘Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-discrimination’.

judicial review of inconsistent measures, and in *María Merciadri de Morini v. Argentina* the failure of a political party to include the correct number of women candidates on the relevant electoral list was successfully challenged. The petitioner argued, among others, that the legal provisions were not only binding on political parties when putting together their lists of candidates, but also established, 'the corollary right of citizens... to be able to vote for slates of candidates on which women are represented' in accordance with the law.<sup>311</sup>

Nevertheless, the Inter-American Commission concluded that, 'discrimination in law persists in certain spheres and countries, and discrimination in fact continues to restrict the ability of women to exercise a range of basic rights, including the right to fully participate in public life'.<sup>312</sup>

The effective exercise of these rights will likely require measures of positive or affirmative action. Article 4 of the Convention anticipates and permits 'temporary special measures' for the purpose of achieving *de facto* equality, and the CEDAW Committee has recommended that States consider measures, such as positive action, preferential treatment or quota systems, 'to advance women's integration into education, the economy, politics and employment'.<sup>313</sup> The Committee's position is restated in stronger terms in General Recommendation 23,<sup>314</sup> and the Human Rights Committee also has recognized that affirmative measures may be taken in appropriate cases to ensure equal access.<sup>315</sup>

Over the past fifteen or so years, a very substantial number of States have introduced legislation on quotas, revised existing laws in the light of legal challenges, or employed other mechanisms to promote more equitable representation. Research shows that the most marked recent increases, for example, in Africa and Latin America, have been clearly due, for the most

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<sup>311</sup> *María Merciadri de Morini v. Argentina*, Case 11.307, Report No<sup>o</sup> 102/99, OEA/Ser.L/V/II.106 Doc. 3 rev. at 69 (1999), 27 September 1999 (Admissibility); Case 11.307, Report No. 103/01, OEA/Ser.L/V/II.114 Doc. 5 rev. at 408 (2001), 11 October 2001 (Merits). A friendly settlement was achieved, reported also in *Annual Report of the Inter-American Commission On Human Rights 2001*, OEA/Ser.L/V/II.114, doc. 5 rev., 16 April 2002, Chapter VI, Special Studies, Update on the Work of the Rapporteurship on the Rights of Women. See also Tom Mapesela, 'Lesotho Court of Appeal upholds gender quotas', 30 June 2005, reporting a landmark ruling in which the Court dismissed an appeal to declare the reservation of one third of the local government seats for women as unconstitutional: [www.quotaproject.org/](http://www.quotaproject.org/) (this site provides a global database of quotas for women, and is a joint project of International IDEA and Stockholm University).

<sup>312</sup> *Annual Report of the Inter-American Commission On Human Rights 2001*, above note.

<sup>313</sup> See Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 5 (7th session, 1988), 'Temporary Special Measures', in 'Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies', UN doc. HRI/GEN/1/Rev.7, 12 May 2004, 225.

<sup>314</sup> Committee on the Elimination of All Forms of Discrimination against Women, General Recommendation No. 23, (1997), paras. 13-15: 'The formal removal of barriers *and* the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are *essential prerequisites* to true equality in public life': *ibid.*, para. 15, emphasis supplied.

<sup>315</sup> Human Rights Committee, General Comment 25, para. 23.

part, to the adoption of quotas for women, and that quotas were also responsible for the dramatic rise in women's representation in the Nordic countries most usually associated with gender equality.<sup>316</sup> Today, some ninety-two countries have either reserved seats, a legislated candidate quota, or political party quota, or are considering legislation. Of these, fifty countries have either a constitutional or legislated quotas, while one hundred and fifty-two political parties in seventy-two countries have adopted voluntary party quotas.<sup>317</sup> In large measure as a consequence of standard-setting by the international community and the UN's electoral assistance programmes, electoral systems in post-conflict states are now more likely than not to include an electoral quota for women's participation, resulting an increase in women's electoral representation.<sup>318</sup> Electoral quotas have been implemented on such a wide basis in every region of the world, and have affected the design of electoral systems, that they ought now to be considered as a minimum necessary requirement to ensure the 'practical realization' of the principle of the political equality of men and women, in the sense of Article 2 of the 1979 International Convention on the Elimination of All Forms of Discrimination against Women.

### 3.6 Electoral administration

Finally, the Human Rights Committee has also stressed that the notion of *effective* rights applies also to the conduct of elections. Thus, those entitled to vote 'must be free to vote for any candidate, ... free to support or to oppose government..., able to form opinions independently.' This implies the absence of undue influence or coercion, violence or threat of violence, compulsion, inducement or manipulative interference of any kind.<sup>319</sup> To these ends, an 'independent electoral authority' should be established, States should take measures to ensure the secrecy of the ballot, including in the case of any permitted absentee voting, the security of ballot boxes must be guaranteed, and votes counted in the presence of candidates or their agents. The confidence of electors in the system in turn requires access to judicial review or equivalent process.<sup>320</sup>

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<sup>316</sup> Inter-Parliamentary Union, 'The Participation of Women and Men in Decision-Making: The Parliamentary Dimension', October 2005; *Women in Politics: 1945-2005*, Geneva: IPU, 2005; *Women in National Parliaments*, Geneva: IPU, 2005; 'Promoting partnership between men and women in parliament', in Julie Ballington & Azza Karam, eds., *Women in Parliament: Beyond Numbers*, Stockholm: International IDEA, 2nd edn., 2006.

<sup>317</sup> International IDEA and Stockholm University, *Global Database of Electoral Quotas for Women: [www.quotaproject.org](http://www.quotaproject.org)* (December 2005).

<sup>318</sup> Examples of recent practice and experience can be found in the following International IDEA publications: *The Implementation of Quotas: European Experiences*, 2005; *The Implementation of Quotas: African Experiences*, 2004; *The Implementation of Quotas: Asian Experiences*, 2003; *The Implementation of Quotas: Latin American Experiences*, 2003.

<sup>319</sup> Human Rights Committee, General Comment 25, para. 19. The Committee also considers that limitations on campaign expenditure may be justified to ensure that free choice or the democratic process is not undermined; see Goodwin-Gill, *Codes of Conduct*, section 2.1.

<sup>320</sup> Human Rights Committee, General Comment 25, para. 20.

## 4. A PRESENT AND FUTURE AGENDA

### 4.1 Free and Fair Elections revisited

The argument 'for' democracy or a democratic form of government as a requirement of international law began in earnest during the early 1990s, but it has perhaps not progressed quite as some might have expected. On the one hand, the notion of democracy as 'individual human right' has remained largely rhetorical, while on the other, democracy's standing as a 'relevant criterion' of entitlement has indeed strengthened across a broader field of political relations. This is particularly well-illustrated by the regional adoption of 'democracy clauses' and their equivalents described above.

Clearly, globalization and technological change have also brought new challenges for the democratic process. Recent years have witnessed the increasing concentration of media ownership among a few players and a greater influence of money, particularly corporate contributions, on party politics and politicians.<sup>321</sup> Various studies have highlighted the gap said to be growing between elected representatives and civil society, which has been variously attributed to the 'professionalization' of politics,<sup>322</sup> electoral systems which do without the 'constituency link', the power of the party, and the marginalization of both electorate and elected from actual decision-making processes.<sup>323</sup>

At the same time, many of the agenda items identified in 1994 are still ongoing, among them, the need for gender balance; better electoral administration; greater protection of political rights; increased accountability; and regulation of funding. In other instances, the lines of struggle have broadened, to include not only women and particular marginalized groups, such as the disabled, but also those disadvantaged by the system. Other related goals are becoming increasingly urgent. Whereas in 1994 it was important to stress the significance of elections according to internationally defined and agreed standards, now in the twenty-first century these important events are seen to be linked both backwards and forwards, in a social and political context that is expected to ensure the free expression of the will of the people, and a result which is consonant with the goal of representative, accountable democracy.

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<sup>321</sup> In relation to finance, Bernard Manin makes the point that because it is easier to get a few substantial donations than many small ones, candidates are 'more inclined to appeal to the rich than to the poor to finance their electoral expenses. And it is reasonable to suppose that, once elected, a candidate will devote particular attention to the interests of those who contributed financially to his election'. See *The Principles of Representative Government*, Cambridge: Cambridge University Press, 1997, 144 (originally published as *Principes du gouvernement représentatif*, Paris: Calman-Lévy, 1995).

<sup>322</sup> Manin again: 'Politicians generally gain power because of their media talents, not because they resemble their constituents socially or are close to them': *Principles of Representative Government*, 193.

<sup>323</sup> On the demise of the parliamentary free to vote according to conscience and personal judgement, see Manin, *Principles of Representative Government*, 203-226.

There may be little consensus in the democracy debate, other than on the unfinished nature of the process, but there is certainly now an international consensus on the building blocks of democracy, and on free, fair and genuine elections as a central feature in the construct. The sum of experience, in turn, leads to greater emphasis today on the broader human rights dimensions to the principle of regular free and fair elections, and to the essential need for protection over time.

The Round Table organized by the IPU in November 2004 to mark the ten years since the adoption of the Declaration on Criteria for Free and Fair Elections highlighted in striking fashion the extent to which the debate has broadened. Even in 1994, no one assumed that judging an election to be free and fair was either straightforward, or sufficient in itself for the emergence of democratic government.<sup>324</sup> On the contrary, what is needed is a tradition of free and fair elections over the long-term:

‘To this extent, election obligations and the goal of representative democracy have a *programmatic* dimension, anticipating progress in building democratic institutions, strengthening the confidence of the people in the democratic process, and leading to better and more democratic government.’<sup>325</sup>

Although written with transition situations very much in mind, these words can be applied across the board. The 2004 IPU Round Table, for example, took the 1994 Declaration as background, but focused also on possible different or complementary approaches to judging the electoral process – by outcomes, by process, and by law.<sup>326</sup> The discussions illustrated many aspects of the current debate, including the question of what is meant by a ‘representative outcome’, in the sense of a government or legislature reflecting the will of the people; the extent to which the authority of the process is undermined by systemic failures to attract the fullest popular participation; and the linkage between elections, human rights, accountability, and the rule of law, both in the electoral context and thereafter, in the business of government. Experience since 1994, particularly that of international and national monitors, has generated closer analysis of the particular elements which combine to make a free and fair election, and the ‘weighting’ of those parts in order to determine whether there

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<sup>324</sup> ‘Determining whether an election is genuine and free and fair involves more than assessing whether electors turn up to vote; it requires a judgment on a dynamic and often evolving process, which itself often demands to be seen as a critical, if somewhat imperfect step in the direction of representative democracy’: *Free and Fair Elections*, 80-81.

<sup>325</sup> *Ibid.*, 84.

<sup>326</sup> See the papers presented at the IPU Round Table by Michael D. Boda, Richard S. Katz, Louis Massicotte, Jørgen Elklit & Andrew Reynolds, in ‘The “Free and Fair” Elections Issue’, *Representation*, Vol. 41, No. 3 (2005).

are some events or flawed processes which, by their very nature, are inherently fatal to a free and fair election. Finally, there remains the question of what precisely is required by international law, and of how international legal obligations can be implemented locally and validly factored into the assessment process.

As shown above, although the interconnectedness of procedures, conditions and outcomes has long been recognized, there is still resistance to recognizing popular participation, equality, social justice, and non-discrimination, as essential democratic foundations, even though each has a sound legal provenance. Arguably, the protection and guarantee of fundamental human rights for everyone without discrimination is a condition of democracy, which engages not only political and civil rights, but also justice in the field of economic, social and cultural rights.<sup>327</sup> Equally, while free and fair elections will not automatically lead to those ends, they are a necessary condition. For this reason, it can help to retain the distinction between a 'right to democratic governance', as political ideal, and the (individual) right to popular participation as required by international law,<sup>328</sup> from this follows the advantage of being able to insist, as it were, from the 'outside', on the State's obligation to promote and protect the individual right.

The dynamic and programmatic dimension to free and fair elections as institutional means to representative democracy can best be understood by returning once again to the underlying premises. Amongst others, 'free' is about participation and choice; 'fair' is about *equality* of participation and of the vote, and about impartiality and non-discrimination; together, they imply respect for human rights at large and the absence of coercion.

Concepts are not self-applying, however, and necessarily so. Those who would judge nevertheless need criteria, and must apply them rationally to the facts, for there is no coherent way to characterize free and fair elections apart from an exercise of judgement by one or other observer or participant. It may well be that too great a latitude for judgement will make the exercise redundant, but the necessity for judgement is not itself a deficit. Given the multiple variables which result, for example, from history and culture, or from choices about systems and implementation, the 'free and fair' standard must remain a *guide*, rather than the determinant of an outcome in every case.

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<sup>327</sup> On the incompatibility of democracy and racism, see Commission on Human Rights resolutions 2000/40 (20 April 2000), 2001/43 (23 April 2001), 2002/39 (23 April 2002), 2003/41 (23 April 2003), 2004/38 (19 April 2004), 2005/36 (19 April 2005); all were adopted without a vote.

<sup>328</sup> See, among others, Steiner, H., 'Political Participation as a Human Right', 1 *Harv. Hum. Rts Ybk* (1988) 77; Franck, T. M., 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law* (1992), 46-91; Fox, G. H., 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992), 539; Marks, S., 'The End of History? Reflections on Some International Legal Theses', 8 *European Journal of International Law* (1997) 449-78. The distinction is not always maintained in the literature.

Moreover, like democracy, ‘free and fair’ is a standard of achievement, and what is or is considered to be free and fair today, may not be so tomorrow.<sup>329</sup> This means neither that everything is relative,<sup>330</sup> nor that ‘free and fair’ is unattainable; from the point of view of any community at any particular time, what matters is that any found discrepancies are both identifiable against a known background of law and principle, and remediable, within the realm of political dialogue and the rule of law. Although analysis and experience over time will surely give concrete form to free and fair standards, and while some usages of the free and fair label have been less scrupulous than others,<sup>331</sup> criticism of the free and fair approach to elections is occasionally off-target. After confessing difficulty in assessing whether an election has satisfied the relevant criteria, Bjornlund’s judgement that ‘the phrase “free and fair” has tended to obscure rather than clarify’<sup>332</sup> reflects a common misapprehension of what is actually involved, and that the conception of a free and fair election derives from *established* legal rules and principles.

On the other hand, Bjornlund is surely correct to regret the uses made of the free and fair label; political and media pressure commonly pushes for simplistic assessments of inherently complex and dynamic processes which, more likely than not, will always be flawed in certain respects. That an election can be considered free and fair while nevertheless revealing certain weaknesses and inadequacies is evident, for example, from the OSCE report on the United Kingdom’s May 2005 election.<sup>333</sup> Clearly, the underlying electoral system can indeed remain free and fair *for the time being*, even as its flaws and the results which it produces increasingly raise questions about how best to achieve the goal of translating the will of the people into seats in the legislature and thus,

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<sup>329</sup> For example, if the ‘unrepresentativeness’ of ‘first past the post’ systems is no longer acceptable to the people at large. Arguably, ‘majority rule’ is no longer, if ever it was, adequate or sufficient to the democratic purpose. Its implicit bipolarity – the supposition that we the people think and move in two planes only – explicitly contradicts the principles of genuine political participation, pluralism, and tolerance of diversity.

<sup>330</sup> Katz poses two questions: (1) whether democracy has a sufficiently clear and unambiguous definition that ‘free and fair elections’ can be assessed on the basis of a uniform set of standards, or whether alternatively there are still many competing understandings of ‘democracy’, each with its own twist on the meaning of ‘free and fair’; and (2) whether, or more properly, to what extent and how, the two standards of ‘free’-ness and ‘fair’-ness are compatible: Katz, R., *Democracy and Elections*, New York: Oxford University Press, 1967. As already noted, however, free and fair elections are not a *sufficient* connection for democracy; international law nevertheless prescribes both a core result – the authority of government *must* be based on the will of the people – and the means by which that will shall be realised – periodic free and fair elects based on the principles of universal suffrage, secret ballot, and equality.

<sup>331</sup> As Elklit & Reynolds, among others, have noted, election observers have often made their judgements on the basis of impressionistic and incomplete evidence, or in a politicised way: ‘Judging Elections and Election Management Quality by Process’, *Representation*, Vol. 41, No. 3 (2005), 189-207.

<sup>332</sup> Bjornlund, Eric C., *Beyond Free and Fair: Monitoring Elections and Building Democracy*, Washington D.C.: Woodrow Wilson Center Press; Baltimore: Johns Hopkins University Press, 2004, 94-95; and see further below.

<sup>333</sup> See above, section 2.4.4, note 237.



in the United Kingdom as in other countries, into an elected, representative and accountable government.

The review of international and regional developments since 1994 confirms strong support and regular re-endorsement of international legal standards, and the existence of a continually evolving body of practice showing the ways by which the required result can be attained, and the means which are best employed to that end.

There is no dissent today from the fundamental principle that the will of the people is the sole basis for the authority of government, or that such will is to be expressed and accepted by way of periodic, genuine, free and fair elections, conducted on the basis of universal, equal and secret suffrage. Likewise, the individual rights so engaged are beyond dispute: Every adult citizen has the right to vote, and to access the process or processes which permit that right to be effectively exercised. Everyone has the right to take part in the government of his or her country, to join or to establish a political party or organization, and to exercise effectively the related political rights without which participation would be meaningless. Equally, everyone is entitled to security and to the protection generally of their human rights.<sup>334</sup>

Moreover, the nature of electoral and political rights, and the legal requirement of effectiveness and efficacy of obligations, entail particular responsibilities for States: To take steps to implement the necessary legislative and institutional framework, in regard to electoral administration, voter registration, political parties, media access and non-partisan coverage, civic education, avoidance of fraud and illegality, remedies, and transparency. The creation of a climate conducive to political competition – absence of violence, opportunities for discussion and the dissemination of political views and platforms, confidence-building through cooperation across the political spectrum – are also particularly matters for state action, either on its own initiative or together with other political actors.

Further experience with the democratization process in countries in transition, with new or restored democracies, and in the longer-established democracies as well, has nevertheless brought about a closer focus on a number of areas of actual or potential concern. Without purporting to be comprehensive, this study has highlighted difficulties and problems in effectively ‘realizing’ the following principles in particular: popular participation, equal suffrage, representation, accountability, and the rule of law. The agenda attaching to each of these, in turn, invites attention to the very nature of democratic, representative and accountable government.

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<sup>334</sup> See generally Beetham, David, ‘The Quality of Democracy: Freedom as the Foundation’, *Journal of Democracy*, Vol. 15 No. 4, (2004), 61-75.



## 4.2 Accountability and verification

One rationale for elections to be held periodically is that, in principle, this allows the electorate to judge and, if appropriate, to rid itself of a particular government or legislature.<sup>335</sup> In this sense, government and elected representatives remain *accountable* to the will of the people, from whom they derive their authority or mandate. In the great eighteenth century debates about the future form of government in the American Colonies, Madison was of the view that the people's representatives should be kept on the virtuous path by a system of constraints, sanctions and rewards. The 'most effectual precaution to keep them virtuous' is to subject them to frequent election and re-election.<sup>336</sup>

'Accountability' also extends to the system and mechanisms by which votes cast are translated into legislative seats, and to the conduct of the State and its organs in regard to the environment in which competitive elections take place. In its 1994 Declaration, the IPU encouraged States to set up a 'neutral, impartial or balanced mechanism for the management of elections', to ensure transparency through the presence of party agents and observers, and to ensure that complaints are determined promptly and effectively by an independent and impartial authority, such as an electoral commission or the courts.<sup>337</sup> These ideas were further developed in 1998, with particular attention to election administration, domestic and international observers, and dispute resolution.<sup>338</sup>

Robert Pastor has rightly observed that, 'The fair and effective administration of the rules is often as important as the rules themselves',<sup>339</sup> but that such administration is commonly underappreciated and undervalued – a 'neglected variable'. In practice, technical problems often become political problems, while an actual or perceived loss of impartiality on the part of the electoral administration can easily translate into a boycott of the process or refusal to accept the outcome of an election as a 'legitimate' or genuine expression of the will of the people.<sup>340</sup>

Historical evidence and observation nevertheless strongly confirm that 'elections run by independent electoral bodies are preferable to those run by executives, and that permanent electoral administrations are more cost

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<sup>335</sup> 'In principle', because, in addition to other requirements of the free and fair standard, the electorate must also be able to exercise choice between competing alternatives.

<sup>336</sup> Madison, quoted in Manin, Bernard, *The Principles of Representative Government*, Cambridge: Cambridge University Press, 1997, 117.

<sup>337</sup> Declaration on Criteria for Free and Fair Elections, sections 4(2), 4(7).

<sup>338</sup> Goodwin-Gill, *Codes of Conduct for Elections*, section 2.3, electoral observation; section 2.5, institutionalization of the electoral process; section 2.5.1, electoral commissions as 'best practice'.

<sup>339</sup> Pastor, Robert A., 'The Role of Electoral Administration in Democratic Transitions: Implications for Policy and Research', *Democratization*, Vol. 6 No. 4 (1999), 1, 6.

<sup>340</sup> *Ibid.*, 11-14, commenting on early decisions by Costa Rica and India to set up electoral commissions in order to keep politics and power away from the process, and on the consequences of a failure to redress perceived bias in the Haitian electoral administration in 1997.

effective than temporary ones.<sup>341</sup> Pastor sees progress towards democratization in the developing world as coinciding with the tendency to place greater responsibility on electoral administration, although this is also being matched in some developed democracies.<sup>342</sup> Although there is no single model, such bodies are ideally permanent, independent of the executive, include political party representation, and are staffed by professional civil servants.<sup>343</sup> Their functions and responsibilities can usefully include administering and implementing the local law, for example, regarding the registration of voters; overseeing the actual conduct of elections, supervising the ballot and the count; promoting transparency at all levels; being accountable to legislature and public; advocating participation by all political parties and the public; and providing voter information and civic education.<sup>344</sup>

Just as it is one of the functions of the electoral administration to ensure that an election is conducted in conformity with the law, so it may be the responsibility of the election observer<sup>345</sup> to determine whether the result reflects a genuine expression of the will of the people, whether the process is seen 'as legitimate and binding by voters and other political players'.<sup>346</sup> This necessarily requires a standard of measurement and, so far as the IPU's 1994 Declaration offered a set of criteria, it is hardly surprising and yet also welcome that these have generated anxious examination, analysis and review, particularly by those actually engaged in assessing electoral performance.<sup>347</sup> Among others,

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<sup>341</sup> López-Pintor, Rafael, *Electoral Management Bodies as Institutions of Governance*, New York: UNDP, 2000, 119.

<sup>342</sup> An electoral commission was established in the United Kingdom in 2001, under the Political Parties, Elections and Referendums Act 2000; see [www.electoralcommission.org.uk](http://www.electoralcommission.org.uk). In the United States, there have been repeated calls for reform of the Federal Electoral Commission, and for it to have effective powers.

<sup>343</sup> López-Pintor, *Electoral Management Bodies*, 117. The generally accepted call for 'independence' in election administration is by no means wholly supported. Boda, for example, notes the overwhelming use of data from developing democracies in support of this position. When he turned to examine the situation in the United Kingdom, he found that, while impartiality remains important, an *interdependent* system for administering elections which offers checks and balances between various governmental and non-governmental institutions, may be a hallmark of the most mature systems of election administration; in the long run, such an interdependent system may well lead to higher levels of accountability. See Boda, Michael D., 'Independence is not a Panacea: A Study of Election Administration using the United Kingdom as a Case Study', (2002), M.St Thesis, submitted to the Faculty of Law, University of Oxford, final chapter.

<sup>344</sup> López-Pintor, *Electoral Management Bodies*, 120.

<sup>345</sup> Observers are generally domestic or international, but in fact *anyone* may find themselves making or called upon to make a judgement on an election. In principle, the 'standard' ought to be the same in every case. Pastor nevertheless recalls that, 'anyone who has observed an election knows that the subjective interpretation of an administrative problem is often inseparable from the problem itself': Pastor, 'Electoral Administration in Democratic Transitions', above note 339, 17,

<sup>346</sup> Elklit, Jørgen & Andrew Reynolds, 'Judging Elections and Election Management Quality by Process', *Representation*, Vol. 41, No. 3, 2005, 189.

<sup>347</sup> For example, see Gould, R., Jackson, C. & Wells, L., *Strengthening Democracy: A Parliamentary Perspective*, Aldershot: Dartmouth, 1995, 90, Appendix 1, 'A Guide for Election Observers' (proposing a definition of 'free' as 'an electoral process where fundamental human rights are respected'; of 'fair' as 'an electoral process where the "playing field" is reasonably level and accessible to all electors, parties, candidates'; and suggesting what rights and freedoms are covered, and what the level playing field entails).

Elklit and Svensson have acknowledged the relevance of internationally accepted criteria, while noting the difficulty of translating ‘such theoretical concepts into a comprehensive list of factors to consider...’, and voicing their concern at the way in which the poll is often excessively the focus of attention.<sup>348</sup> They also raise a perennial problem, namely, how to approach situations which fall between the simple dichotomies of free/not free, fair/not fair.<sup>349</sup>

In his recent critical examination of the work of the international observer, Bjornlund characterises the election as ‘a fundamentally political process’.<sup>350</sup> Although he acknowledges that there is consensus over standards in theory, he nevertheless suggests that,

‘the standards by which international observers assess elections remain vague... Although typically articulated as minimum standards for free and fair elections, such criteria are usually broad aspirations. Assessing whether a given election has met such standards can be extremely difficult, and external considerations often influence such assessments... The phrase “free and fair” has tended to obscure rather than clarify.’<sup>351</sup>

As a source of standards, however, international law is a dynamic and evolving process, in which the constantly developing practice of States – generally forwards, but sometimes backwards – plays its essential role. The ‘free and fair’ standard certainly has an aspirational aspect,<sup>352</sup> but the direction and the path are indicated by a number of clear markers, whether the purpose is a once for all determination of a single election, or a review and assessment of progress, if any, towards the goal of representative and accountable democratic government.

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<sup>348</sup> Elklit, Jørgen & Palle Svensson, ‘What Makes Elections Free and Fair?’ *Journal of Democracy*, Vol. 8 No. 3 (1997), 32, 34. Cf. Pastor, Robert A., ‘Mediating Elections’, *Journal of Democracy*, Vol. 9 No. 1 (1998), 154-63; see also, Katz, Richard, *Democracy and Elections*, New York: Oxford University Press, 1997.

<sup>349</sup> Elklit & Svensson, above note, 38, 41-2: ‘Whereas freedom is a necessary – though not sufficient – condition for an election’s acceptability, the combination of freedom *and* the fair application of electoral rules is both necessary and sufficient for such acceptability.’ Nevertheless, there may also be cases where, ‘balloting that is neither clearly free and fair nor clearly *not* free and fair, but acceptable when technical limitations and prospects for progress towards democracy are taken into account.’ As it stands, however, this approach leaves open the full implications of ‘free and fair’, for example, in matters of participation, equality and representation, while proposing ‘progress towards democracy’ as a clearly separate question and answer.

<sup>350</sup> Bjornlund, Eric C., *Beyond Free and Fair*, 94.

<sup>351</sup> *Ibid.*, 94-5. Chapter 6 as a whole (‘Toward Free and Fair Elections?’) provides a very useful summary of the challenges facing international observers in particular, when deciding whether to observe, what and how to assess, and in choosing the language of ‘result’. It illustrates well the external contradictions facing organizations, even as they must deal with the actual or perceived limitations of their own institutional mandates.

<sup>352</sup> Much as the 1948 Universal Declaration of Human Rights proclaims itself as ‘a common standard of achievement for all peoples and all nations’.

The apparent vagueness of free and fair standards and their reported difficulty of application in different contexts may lead to their being negatively characterized as relative. If it is accepted that 'free and fair' is a single standard (which it is not), or an essentially political standard (though comprising particular legal rules and principles), then 'free and fair' is always and necessarily relative.<sup>353</sup> Contrary to some commentators,<sup>354</sup> 'context' is ultimately no more subjective than anything else, provided that the observer does not lose sight of the goal, or imagine that elections are an end in themselves, and provided also that the observer does not allow context to compromise what are generally flexible principles, or sanction the violation of rights.

Given the multifaceted and multi-dimensional nature of elections, and their definition through time, rather than at a single moment, it is not surprising that judgements on the record can seem problematic to those who make or receive them.<sup>355</sup> It is not an adequate answer to argue that this is the nature of the 'free and fair' criteria, or that the standard is necessarily one which evolves in the face of new issues. As was shown in *Free and Fair Elections* and as has been reiterated in the work of others,<sup>356</sup> international law does provide standards in the form of rules and principles, and it is going far too far to suggest that there is no common perception of what free and fair elections are.<sup>357</sup> Elklit and Reynolds, on the other hand, set themselves the task of building on standards, focusing on the entire electoral process and specifically on 'the way in which elections are conducted'; they suggest to begin with a framework of some fifty-four 'electoral indicators'.<sup>358</sup> As Boda emphasizes, however, it is important to maintain the anchor provided by international law. In this way, 'indicators' remain relevant as *facts*, the data or empirical evidence which allows assessments to be made against a legal rule or principle. The law nevertheless

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<sup>353</sup> Does it make sense to say that elections in France, or Germany, or Canada, or the Netherlands, are free and fairer than in the United Kingdom? They are each the product of complex historical, social and cultural processes and certainly different. Each country applies an electoral system which produces 'alternative' results, but a simple comparison, rather than comparative analysis within a framework of rule and principle of agreed particulars (such as voter registration, party funding, and so forth) is unlikely to prove helpful.

<sup>354</sup> Cf. Bjornlund, *Beyond Free and Fair*, above note 350, 121.

<sup>355</sup> Boda cites a report by Michael Dynes (*The Times*, 11 March 2002, 'Africa's reaction to Mugabe puts its credibility at risk'), noting in regard to Zimbabwe's election that while South African election observers were openly shocked by 'the scale and brazenness of the violence carried out by Mr. Mugabe's roaming bands of thugs against opposition supporters', they were still at odds over whether to declare the electoral process 'sufficiently' free and fair or not free and fair at all: Boda, Michael D., 'Reconsidering the "Free and Fair" Question', *Representation*, Vol. 41, No. 3, 2005, 155, 155-6.

<sup>356</sup> A useful though not always clear or complete comparative listing of 'codes' and 'standards' can be found in Bjornlund, *Beyond Free and Fair*, above note 350, 100-17.

<sup>357</sup> As is suggested in Choe, Yonhyok and Staffan Darnolf, 'Free and fair elections: What do we mean and how can we measure them?', in Kotze, H. and Rasch, B. E., (eds), *Elections and Democracy in Southern Africa*, Oslo: Norwegian Institute of Human Rights, 2000, 228-270. Cf. Boda, Michael, D., 'Judging Elections by Public International Law: A Tentative Framework', *Representation*, Vol. 41, No. 3, 2005, 208.

<sup>358</sup> Elklit, Jørgen & Andrew Reynolds, 'Judging Elections and Election Management Quality by Process', 2005, *Representation*, Vol. 41, No. 3, 2005, 189.

has its limits, and while it may prescribe conduct or result, frequently has little to say about 'method'. At the IPU Round Table, Kriegler rightly pointed out that,

'An electoral evaluation is surely much more than a two-dimensional audit of the various steps taken by an administration in preparing for and conducting an election. What is to be determined is much more value-laden, much more normative and much more context-dependent.'<sup>359</sup>

International law, as such, does not provide straight answers to the question, 'Was this a free and fair election?' Answers in this context are necessarily fact-dependent, although the facts may in turn be identified through the elaboration and application of indicators such as are proposed by Elklit and Reynolds. Equally, the *value* of those facts cannot be determined by any rule of international law, for every rule depends on human agency for its application. The art is in moving between the international legal norms and the social reality, and in an awareness both of socio-political context and of the broader process, which is the ever-evolving journey towards democracy. Once these conditioning elements have been acknowledged, including recognition of free and fair elections as necessary but not sufficient, so the observer and the international lawyer can assume the responsibilities of assessment. So far as that evaluation is based on international standards, so the process of reaching a decision must satisfy certain intrinsic rules: A basis in law; a basis in fact; consistency; logical coherence; overt reasoning; and justification, in the sense of a reasoned evaluation demonstrably linking law and facts to the conclusion.

'Indicators' may certainly serve as facts, but 'evaluative indicators' are not facts in the juridical sense. Hence, while one must acknowledge the value of breaking down the electoral system into its operational parts with a view to assessing the efficient and effective working of each, a measure of caution is required before translating performance into numerical values and making a free and fair election, as it were, the sum of its parts.<sup>360</sup> International law at present may not permit the objective and clinical answer that many seek to the 'free and fair' question; it does, however, provide *the* standard to be achieved, namely, that the election produces an outcome which expresses the will of the people. It also prescribes certain obligations of conduct – protection of fundamental human rights – and of result – universal suffrage, equality and secret ballot – all of which confine and structure the conduct of States as

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<sup>359</sup> Kriegler, Johann, in reply to Michael Boda's paper presented at 'Free and Fair Elections, Ten Years On: An International Roundtable on Election Standards', organized by the IPU in Geneva, 12-13 November 2004; cited in Boda, 'Judging Elections by Public International Law: A Tentative Framework', above note 357, 208, 222-3.

<sup>360</sup> This point is indeed anticipated by Elklit & Reynolds, who suggest a number of ways to address this issue; above note 358.

primary actors. The ‘free and fair’ criteria are the normative background against which to make a value judgement on the electoral process in context. Considered in this way, it is not without value to assess elections themselves as evidence or not of progress towards democracy; or as evidence or not of backsliding. Such an assessment, if done well, is likely to be nuanced, recognizing weaknesses as well as strengths. Of course, faced with evidence of egregious failure, large-scale disenfranchisement, systemic violence or widespread and significant intimidation, or absence of effective choice, the judgement ‘Neither free nor fair’ may be right and proper, notwithstanding the ‘efficiency’ of electoral administration. On the other hand, no election in any country is likely to be one hundred per cent satisfactory. There is always room for administrative improvement, as there is for the re-evaluation of systems which may now no longer deliver on peoples’ expectations in a pluralist or multicultural society.

### **4.3 Participation, representation, and equality**

International law identifies the will of the people as the sole basis for the authority of government; that will is to be determined by way of the electoral process, in which every adult citizen has the right, on equal terms, to vote, to elect, and to stand as a candidate.

If everyone’s rights in these matters are to be effective, then a substantial catalogue of negative and positive obligations must be engaged.<sup>361</sup> But between the right of the individual and the reality of effective participation, any number of obstacles may intervene, such as de-registering or failing to register voters, obstructing access to polling booths, either physically or by locating them in remote places, and interference with election campaigning and the communication of political platforms. Other obstacles may not be intentional or deliberate as such, but the tolerated remnants of practices which failed to accommodate particular groups or categories of electors in the past, and which apathy, indifference or self-interest today leaves uncorrected. The review of UN and regional practice above has shown how women and ethnic minorities may be affected by such practices, as well as refugees and internally displaced persons, for whom no one has thought to make provision. It has also revealed another worrying and growing group of ‘non-participants’, identified by their disenchantment by or alienation from a system of government which does not, in reality or in their perception, come close to representing their interests or views.

Clearly, the explanations for non-participation are legion, while the ‘problem’ defies simple solutions. Overt obstruction, as Bjornlund notes, can

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<sup>361</sup> See IPU, Declaration on Criteria for Free and Fair Elections, Part 4: ‘The Rights and Responsibilities of States.’

be countered by election monitoring,<sup>362</sup> but the more insidious forms of disenfranchisement require positive action, even wholesale reform, if government is to enjoy the legitimacy of authority founded in the will of the people. As the IPU's Universal Declaration on Democracy, among others, has affirmed, democracy requires 'representative institutions', and individual participation cannot be taken for granted:

'It is... necessary to develop conditions conducive to the genuine exercise of participatory rights, while also eliminating obstacles that prevent, hinder or inhibit this exercise. It is... indispensable to ensure the permanent enhancement of, *inter alia*, equality, transparency and education and to remove obstacles such as ignorance, intolerance, apathy, the lack of genuine choices and alternatives and the absence of measures designed to redress imbalances or discrimination of a social, cultural, religious and racial nature, or for reasons of gender.'<sup>363</sup>

Democracy, moreover, presupposes a 'genuine partnership between men and women', 'free political competition', and 'open, free and non-discriminatory participation by the people, exercised in accordance with the rule of law, in both letter and spirit.'<sup>364</sup>

The reality in many countries is still far from the ideal. The IPU's most recent review, for example, showed women's representation in parliament at 16 per cent, as of September 2005.<sup>365</sup> While this may be the highest to date, it falls short of many regional and national targets,<sup>366</sup> and women are still largely under-represented, not only in parliament, but at most levels of government. In a comprehensive resolution on 'Women and political participation', adopted without a vote in 2003, the General Assembly recognized,

'that women's full and equal participation in the political process and decision-making will provide a balance that more accurately reflects the composition of society, is needed to strengthen democracy and promote its proper functioning, plays a pivotal role in furthering women's equal status, including improving women's socio-economic status, and contributes to redefining political priorities and providing new perspectives on political issues...'<sup>367</sup>

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<sup>362</sup> Bjornlund does not doubt that election monitoring, 'has contributed significantly to the democratic cause in the world'; blatant fraud on election day is now almost unheard of in internationally monitored elections: Bjornlund, *Beyond Free and Fair*, above note 350, 304.

<sup>363</sup> IPU, Universal Declaration on Democracy, articles 11, 18.

<sup>364</sup> *Ibid.*, articles 4, 5.

<sup>365</sup> IPU, *Women in National Parliaments*, 30 September 2005.

<sup>366</sup> On the Council of Europe position, see above, text to note 218. Thirty per cent representation by women is seen as a 'critical mass', the point at which real changes in parliament begin to occur.

<sup>367</sup> UNGA res. 58/142, 'Women and political participation', adopted without a vote, 22 December 2003, preamble. See also UNGA res. 59/168, 'Follow-up to the Fourth World Conference on Women and full



While noting that education and training are important prerequisites to participation in public life and that poverty is a disproportionately negative factor, the General Assembly nevertheless urged States to promote and protect the political rights of women, eliminate discriminatory laws, implement positive measures, and monitor progress (including that of political parties) in providing equal and fair opportunities for women.<sup>368</sup> It also invited governments to encourage political parties to remove barriers discriminating directly or indirectly against women, and to take active steps to bring women into the political process.<sup>369</sup> Particularly striking, however, is the General Assembly's call on States,

‘To review the differential impact of their electoral systems on the political representation of women in elected bodies and to adjust or reform those systems where appropriate...’<sup>370</sup>

The central importance of *systems*, or choice of electoral system, as a feature of the democratic process is increasingly acknowledged. Writing in 2004, David Beetham noted that while the nature of any electoral system is traditionally considered to reflect national culture, history and identity, yet

‘... it still stands to reason that there must be a level at which an electoral system becomes so skewed and unequal, whether to voters or to parties other than the favoured one, that basic principles of fairness and justice have been compromised and democracy diminished, perhaps gravely.’<sup>371</sup>

In an earlier analysis, Beetham located the principle of political equality squarely at the base of the elected assembly, considered as ‘representative’ of the whole electorate. ‘Representative’, in this context, implies reflecting the most important characteristics of the electorate, in the matter of geographical distribution, political opinion, and social composition,<sup>372</sup> in his view, ‘for

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implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session of the General Assembly’, adopted without a vote, 20 December 2004. In paragraph 10, the General Assembly, ‘*Emphasizes* that the creation of an enabling environment at the national and international levels, including by ensuring the participation of women on an equal basis with men at all levels of decision-making, is necessary to ensure the full participation of women in all aspects of social, political and economic activities, and in this regard calls upon States to remove obstacles to the full implementation of the Beijing Declaration and Platform for Action and the outcome of the twenty-third special session...’

<sup>368</sup> UNGA res. 58/142, paragraph 1.

<sup>369</sup> *Ibid.*, paragraph 2.

<sup>370</sup> *Ibid.*, paragraph 1(f).

<sup>371</sup> Beetham, David, ‘The Quality of Democracy: Freedom as the Foundation’, *Journal of Democracy*, Vol 15 No 4 (2004), 61, 69. See also Beetham, David, *Democracy and Human Rights*, London: Polity Press, 1999, 170, on the ‘democratic criteria’ for electoral systems.

<sup>372</sup> Beetham, *Democracy and Human Rights*, 175.



encouraging a more socially representative parliament, the first past the post system is about the worst',<sup>373</sup> a conclusion echoed in a meeting organized jointly by the IPU and the UN Division for the Advancement of Women in March 2005: proportional systems, it was said, tend to benefit women running for elected office, while 'first past the post systems are extremely disadvantageous to them'.<sup>374</sup> Pursuing the argument from equality, Beetham concludes with regard to the use of the single transferable vote in multi-member constituencies, that here,

'all votes count towards the result, and count more equally; parliament is more representative of political opinion in the country; parties are encouraged to make their selections of candidates more socially representative...'<sup>375</sup>

The question of electoral systems, participation and representation goes to the heart of the process by which the will of the people is expressed. The situation of women illustrates how systemic flaws can disadvantage one particular social group representing one half of the people, in the exercise of their political rights, as in other civil, economic, social and cultural fields.

The deficiency is as much linked to equality, as it is to consent.<sup>376</sup> In the 1647 'Putney Debates', the Levellers' Representative, Colonel Thomas Rainsborough argued that, 'Every man that is to live under a government ought first by his own consent to put himself under that government; and I do think that the poorest man in England is not at all bound in a strict sense to that

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<sup>373</sup> Ibid., 178. As recent comment puts it, one of the disadvantages of 'first past the post' is, quite simply, that 'It excludes women from the legislature': Reynolds, Andrew, Ben Reilly & Andrew Ellis, eds., *Electoral System Design: The New IDEA Handbook*, Stockholm: International IDEA, 2005, 37, para. 79.

<sup>374</sup> 'Beyond Beijing: Towards Gender Equality in Politics'. See IPU, 'Final Report, One Day Parliamentary Meeting on the Occasion of the 49th Session of the Commission on the Status of Women: Beijing + 10,' New York, 3 March 2005.

<sup>375</sup> Beetham, *Democracy and Human Rights*, 188. As Michael Dummett also has noted: first past the post 'does not give the voters the opportunity to express all their preferences between the candidates, and hence all the preferences that would be relevant to determining what the outcome ought to be under a just system. That is a grave defect indeed': *Principles of Electoral Reform*, 11. For similar views generally, see Reynolds, Andrew, Ben Reilly & Andrew Ellis, eds., *Electoral System Design: The New IDEA Handbook*, 2005, 35-7. In relation to systems intended to bring conflict to an end, see Reilly, Ben & Reynolds, Andrew, *Electoral Systems and Conflict in Divided Societies*, Washington D.C.: National Academy Press, 1999; the authors note that so-called 'winner takes all' systems 'tend to lock out minorities' (16), and that 'the most important factor for democratic transition in electoral terms is usually a system that maximises inclusion...' (54; emphasis supplied). Cf. Michael Dummett, *Principles of Electoral Reform*, Oxford: Oxford University Press, 1997, 178 ('winner takes all'... 'subverts the principle of... "elective dictatorship"...'); see also Wheatley, S., 'Deliberative democracy and minorities', 14 *European Journal of International Law* 507 (2003); Prowse, M., 'Winner still takes all', *Prospect*, May 2005, 36.

<sup>376</sup> Manin, Bernard, *The Principles of Representative Government*, Cambridge: Cambridge University Press, 1997, 59-62.

government that he hath not had a voice to put himself under.<sup>377</sup> But this view did not prevail, and the continuation of property and other qualifications, as well as the purposive disenfranchisement of women until the twentieth century, hardly reflected acceptance of consent to the full extent dictated by the principle of equality. Even after ‘triumph’ of elections generally and the victory of universal suffrage, Manin feels able to ask whether,

‘... if the intrinsic properties of election are such that the ruled are able to choose their rulers only from certain categories of the population, can they still be said to be giving their consent freely?’<sup>378</sup>

The question is clearly in point, wherever the empirical evidence shows elections producing less than equitable representation of a political party, social, or minority group in any given political community.<sup>379</sup> The limited representation of any such group, notwithstanding their nominal entitlement to participate in the electoral process on the basis of formal equality, necessarily invites closer attention to the nature of democratic, representative and accountable government.

#### 4.4 The evolving agenda

The review of activities and developments since the adoption of the IPU’s Declaration on Criteria for Free and Fair Elections in 1994 has allowed the identification of a number of key themes, and of issues which increasingly require attention, if progress towards representative and accountable democratic government is to be maintained.

Above all, there is no doubting the centrality of elections as the means by which the people expresses its will, and through which it lays down the constitutional basis for the authority of government; but elections are neither the beginning, nor the end of democracy. Equally beyond dispute are the essential features of *any* electoral system: universal suffrage, secret ballot, equality of the vote, and periodicity. The right to vote, considered as an individual’s entitlement, may be subject to *reasonable* restrictions, such as minimum age and residence, and it may be denied or suspended in certain

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<sup>377</sup> Quoted in Manin, *Principles of Representative Government*, 83-4. The Putney Debates were held in the parish church of Putney, at the time of the English Civil War. At these meetings, the Army Council, including Oliver Cromwell, and ordinary soldiers, debated whether to continue seeking a negotiated settlement with Charles I. The group known as the Levellers also argued a revolutionary alternative, namely, near universal male suffrage, but this was rejected by the leadership as likely to undermine the security of private property. See further ‘The Putney Debates’ in Aylmer, G. E., Ed., *The Levellers in the English Revolution*, Ithaca, NY: Cornell University Press, 1975, 100; Mendle, M., ed., *The Putney Debates of 1647: The Army, the Levellers, and the English State*, New York: Cambridge University Press, 2001.

<sup>378</sup> Manin, *Principles of Representative Government*, 157.

<sup>379</sup> ‘Less than equitable’ begs the question, but in the light of the earlier review, must suffice for present purposes.

limited circumstances, such as conviction and imprisonment for serious crime. No restrictions or exceptions are permissible, however, on the principle of secret ballot; or on the principle of political equality – the idea that ‘everyone counts for one’.<sup>380</sup>

Nevertheless, in each of the last-mentioned fields, challenges are emerging. Recent experience in several countries indicates a possible threat to the secret ballot arising from the introduction of untested or insufficiently secured technologies for electronic voting,<sup>381</sup> and from the adoption of postal voting, again without adequate guarantees, in pursuit of the otherwise laudable aim of encouraging greater popular participation.<sup>382</sup>

In the matter of political equality, as just seen, more serious issues are apparent. One aspect of the problem relates to ‘districting’ or constituency delimitation. While it has long been accepted in many jurisdictions that perfect equality of numbers among voting districts is not required,<sup>383</sup> and that each State retains a margin of appreciation in the territorial organization of its chosen electoral system, ‘[t]he general aim remains the same, to translate the will of the people into *representative* government.’<sup>384</sup> The deeper, systemic problem is presented by the fact that minority and other groups in society are still commonly under- or unrepresented; this requires positive action on the part of government, if the result required by the principle is to be attained.<sup>385</sup> In some instances, quotas can counter systemic exclusion from political life; in others, more radical reform may be essential.

That a system is said to be ‘representative’, as Bernard Manin remarks, ‘is not the fact that a few govern in the place of the people, but that they are selected by election only’<sup>386</sup> – not by lot, by appointment, or by reason of social origin, but as a consequence of the consent that comes from a vote cast individually, independently, and on the basis of equality. The appearance of equality, however, is as potentially diverting as the persistence of the notion

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<sup>380</sup> Cf. Beetham, D., *Democracy and Human Rights*, 1999, 173; also, ‘The Quality of Democracy: Freedom as the Foundation’, 15 *Journal of Democracy* (No. 4), 2004, 61-75.

<sup>381</sup> See Boda, Michael D., ‘Independence is not a Panacea: A Study of Election Administration using the United Kingdom as a Case Study’, M.St thesis submitted to the Faculty of Law, Oxford, University of Oxford, 51-62; Fallows, J., ‘Electronic Voting 1.0, and No Time to Upgrade’, *New York Times*, 28 November 2004.

<sup>382</sup> See Boda, above note.

<sup>383</sup> See below, Part 2, *Free and Fair Elections: The Development of International Law and Practice*, section 3.1.2.

<sup>384</sup> *Ibid.*

<sup>385</sup> See, among others, Venice Commission, ‘Electoral Law and National Minorities’, CE Doc. CDL-INF (2000); 1999 Lund Recommendations on ‘Effective Participation of National Minorities in Public Life’, annexed to Packer, J., in 11(4) *Helsinki Monitor* (2000), 29.

<sup>386</sup> Manin, Bernard, *Principles of Representative Government*, 40.

that elected representatives ‘speak for’ those who have elected them.<sup>387</sup> On the other hand, it is also the case with representative government that,

‘In that its base has expanded enormously, [it] has, since its establishment, become more democratic... However, the democratization of representation, the narrowing of the gap between representatives and represented, and the growing influence of the wishes of the governed on the decisions of those in government have turned out to be less durable than expected. While one can certainly say that democracy has broadened, one cannot say with the same certainty that it has deepened.’<sup>388</sup>

The principle of accountability puts new emphasis on the responsibility of those who govern to those affected by their decisions. Even of itself, it implies the broadest participation by those affected, and the existence of *effective* means, in and outside the electoral context, by which the people may express their will. What is called for, therefore, is government which is demonstrably based on the will of the people, does not unreasonably or disproportionately reflect the particular interests of minority groups or corporations, and reflects the widest popular participation.<sup>389</sup> It is in the quest for a deepening of democracy that the linked issues of participation and representation in its other sense (unrepresented, under-represented) acquire importance today. They touch both elections and outcomes, whether the latter is understood narrowly as ‘electoral results’, or more broadly, as covering the delivery of democratic goods, such as accountability, the rule of law, and social justice.

#### 4.5 The ‘democratic imperative’

From an international law perspective, the nature of the government of a State was long a matter of indifference. When attention began to turn to transition situations, whether as part of conflict settlement or internal revolution, the mechanism of elections came to the fore as the preferred means for resolving or mediating competition, and thus to be the hallmark of ‘legitimacy’ in international relations.<sup>390</sup> Whether ‘an international norm of democratic

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<sup>387</sup> See Manin, 132-34, 149-50, 157, on a ‘democratic aristocracy’; at 193 and following, the ‘metamorphoses of representative government’; and at 206-15 (noting, among other developments, that in the modern political world, elected representatives owe their placement to the party). Cf. Marks, S., *The Riddle of all Constitutions*, Oxford: Oxford University Press, 2000, 59: ‘Universal suffrage has not put an end to inequalities in the capacity of citizens to exercise and influence state power, because that capacity is affected by disparities in society. Subordinate socio-economic status tends to reinforce, and be reinforced by, political marginalization.’

<sup>388</sup> Manin, *Principles of Representative Government*, 234.

<sup>389</sup> As already noted, ‘majority rule’ may no longer be adequate or sufficient to the democratic purpose, if ever it was; see above note 329 and accompanying text.

<sup>390</sup> Marks, *Riddle of all Constitutions*, 40.

governance' has emerged, however, is entirely another matter,<sup>391</sup> which leaves many substantive questions begging.<sup>392</sup> Marti Koskenniemi, for example, has suggested that any such norm,

'... is too easily used against revolutionary politics that aim at the roots of the existing distributionary (sic) system, and it domesticates cultural and political specificity in an overall (Western) culture of moral agnosticism and rule by the market.'<sup>393</sup>

That elections are a necessary, but not a sufficient condition for democracy is hardly surprising, in so far as democracy is not a received state, a given, a place, or a single destination, but rather an evolving system or systems of self-rule.<sup>394</sup> The set of standards governing the conduct of elections has consequently and hitherto focused on form and structure, but not to the exclusion of other issues. The present and developing attention to participation, representation in the sense discussed above, equality, pluralism, and free 'competition' among political actors, takes the discourse beyond form, and into that of context and outcomes. In *The Riddle of all Constitutions*, Susan Marks critically examines some of the consequences that flow from elections without more, and which may produce what she calls 'low intensity democracy'.<sup>395</sup> In such situations, governments may be generated,<sup>396</sup> but they are likely to be fragile and simply unable 'to redress fundamental political and economic problems'.<sup>397</sup> In her view,

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<sup>391</sup> At the regional organization level, in particular, there is nevertheless now considerable support for democratic governance as a condition of participation, and for co-operative measures to be taken in the case of 'unconstitutional' changes of government among the membership; see above, section 2.4.

<sup>392</sup> The criticism is usefully summarised in Marks, *Riddle of all Constitutions*, 30-49.

<sup>393</sup> Koskenniemi, M., "'Intolerant Democracies': A Reaction", 37 *Harvard International Law Journal* (1996), 231, 234; quoted in Marks, *Riddle of all Constitutions*, 47. Diamond, writing in 2002, noted that, '... more regimes than ever before are adopting the *form* of electoral democracy, with regular, competitive, multiparty elections... [M]any of these regimes – indeed, an unprecedented proportion of the world's countries – have the form of electoral democracy but fail to meet the substantive test, or do so only ambiguously. And... with heightened international expectations and standards for electoral democracy, including the rise of international election observing, there is closer international scrutiny of individual countries' democratic practices than ever before': Diamond, L., 'Elections without Democracy: Thinking about Hybrid Regimes', *Journal of Democracy*, vol. 13, (2002), 21, 22.

<sup>394</sup> As the IPU's Universal Declaration on Democracy puts it: 'constantly perfected and always perfectible': Article 2.

<sup>395</sup> Marks, *Riddle of all Constitutions*, 50-75. Cf. Diamond, 'Thinking about Hybrid Regimes', above note 393, 25-29, where he considers the rise of 'pseudodemocracy' and the contrast between electoral democracy and electoral authoritarianism.

<sup>396</sup> Cf. the problem identified by Reilly & Reynolds, namely, democratic failure following on the use of essentially divisive electoral systems, such as 'winner takes all': *Electoral Systems and Conflict in Divided Societies*, 1999, 16-18, 53-7.

<sup>397</sup> Marks, *Riddle of all Constitutions*, 58. Although this may often be the case in many States in transition, (where stability, any stability is accorded the highest value), the phenomenon can also strike established democracies, as the gap widens between the popular vote and the result, between governed and governing.

‘The fact that parliaments are subject to periodic popular recall is not, of itself, sufficient to justify public power. Democracy demands that state authority be required to justify itself to the citizenry on a continuing basis. To enable this, a democratic polity must include a vigorous “public sphere”... an arena distinct from the institutions of the state in which citizens can come together to define collective goals, shape public policies and evaluate government activity.’<sup>398</sup>

In a not dissimilar way, the criteria for free and fair elections do not begin and end with a simple checklist of administrative tasks and performance, but broaden into matters of policy and practice where variations from the ‘average’ may be permissible and yet require to be judged or ‘appreciated’ against principle.<sup>399</sup> This is an inherent feature of ‘free and fair’, and explains the relevance of issues as apparently diverse as funding, media access, media coverage, and political party organization. It also justifies the greater attention being paid to social and economic factors as actual or potential barriers to participation, and thus to an election in conformity with international standards.

The evolving international discourse on the *results* of free and fair elections builds on and contributes to the applicable international standards. Representative and accountable democratic government is now associated with, among others, the rule of law, the separation of powers, an independent judiciary, protection of human rights and fundamental freedoms, and the progressive and effective implementation of economic and social rights.<sup>400</sup> Reading back to the electoral field, the elections standard is now also clearly strengthened by increasing acceptance of such related institutions and practices. These include the independent observation of elections by both domestic and international monitors; the independent administration of elections by a sufficiently resourced and competent national commission or equivalent body; effective guarantees of the rights which allow for true competition between political alternatives; the promotion and protection of an environment which favours the creation and activities of political parties and organizations; proactive measures to supplement formal guarantees of equality and bring women into the political process; and further measures to counter the social exclusion from political life which flows from extreme poverty and other factors such as disability, and the exclusion by indifference which results from,

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<sup>398</sup> Marks, *Riddle of all Constitutions*, 59.

<sup>399</sup> See above, section 1.

<sup>400</sup> In his review of Dunn, J., *Setting the People Free: The Story of Democracy*, London: Atlantic Books, 2005, David Wootton notes that, ‘It is a feature of [representative democracy] that the representatives of the people cannot always be assembled; thus there has to be a standing source of authority separate from the legislature, *and that authority has to be controlled*’ (emphasis supplied); hence, the written constitution, the separation of powers and, above all, the necessity for entrenched rights. *Times Literary Supplement*, 23 September 2005, 7-10.

among others, non-representative voting systems and the increasing distance between governing elites and the people at large.

These are some of the challenges facing the electoral process and the struggle for representative and accountable democratic government;<sup>401</sup> and this, then, is the present and future agenda: To work for the progressive, rights-based development of basic principles, and to the fuller realization of democracy through popular participation, the effective involvement, inclusion and representation of all sectors and groups in society, transparency and accountability of electoral institutions and the institutions of government, the separation of powers, and the rule of law.

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<sup>401</sup> Other challenges, such as the narrowing of democracy from many causes, including terrorism, restrictions on civil liberties in the name of security, concentrations of media power, censorship and control, are dealt with elsewhere.

# Part 2

Free and Fair Elections:  
The Development of International Law and Practice  
(1994)





## 1. INTRODUCTION AND OBJECTIVES

The ideal of democracy and the right of everyone to participate in the government of his or her country are clearly set out in article 21 of the 1948 Universal Declaration of Human Rights. Specifically, the provision in article 21(3) that ‘the will of the people shall be the basis of the authority of government’ stands as a straightforward statement of the principle of representative democracy, which is now increasingly seen as essential to the *legitimation* of governments among the community of States. Existing universal and regional human rights instruments, however, provide little detailed guidance on key issues, such as the periodicity of elections, the organization and entitlements of political parties, voter rights and registration, or the conduct of the ballot. That elections should allow expression of the ‘will of the people’ may offer a standard of effectiveness, but the ways and means by which progress towards that standard can be measured remain variable.

Political rights, such as the freedom to hold opinions, and to meet and exchange ideas and information, are central to the consolidation of democratic government and the rule of law. International institutions, however, such as the UN Commission on Human Rights and regional supervisory organizations, have done relatively little to develop either the conceptual foundations of these rights, or the practical application of the rights of participation. At the same time, the active involvement of the United Nations, the Inter-Parliamentary Union and a variety of inter-governmental and non-governmental organizations in election monitoring and technical assistance at the field level, is even now producing a body of practice that is contributing to the consolidation of norms and practices.

Still, there is a pressing need for clear criteria by which to judge whether elections are free and fair. In part, this will serve the interests of election monitors by enabling them to move beyond overly simplified gestures of approval or condemnation; but more importantly, such criteria are likely to increase national and international confidence in the electoral process, by reducing the necessity for challenge, limiting the possibilities for the arbitrary rejection of election results, and facilitating the transfer of power.

Terms like ‘periodic’, ‘free’, ‘fair’, and ‘genuine’, have no easily verifiable content, often being used subjectively, in an appeal to those assumed to share basic values and outlooks. In practice, it may be easier to identify what is not a free, fair or genuine election, by focusing on evidence of overt external influence, the lack of meaningful choice in single candidate and single party systems, or terrorisation of the electorate.

The objective of this study, however, is to get beyond presumptive or subjective assessments, to present a catalogue that is inductive, rather than deductive, and as capable of objective application as possible. The aim is thus

to show what international law requires, drawing on existing rules and standards, but with special concentration also on the practice of States, including a selective and illustrative comparison of recent electoral laws and practices. In addition, the experiences of a number of observer and technical assistance missions to States in transition to representative democracy are considered, including the 'new' activities which the United Nations is now pursuing through the Electoral Assistance Unit established in 1992. The impact of these potentially norm-creating activities is also examined in the light of State sovereignty claims and concerns, bearing in mind article 2(7) of the UN Charter.<sup>1</sup> The ultimate question is whether any consensus exists on common standards, and how relevant are the variations or deviations, considered from an international law perspective.

One advantage of an international approach that draws upon comparative experience lies in its capacity to integrate variations in historical and cultural circumstance, and to accommodate different ways of determining what it is that the people choose. At the same time, international law's scheme of basic rules provides a number of organizing principles around which to assess, for example, the 'validity' of national legislation and practice, considered in terms of their contribution to the effective implementation of international obligations.

What is often forgotten is how recent are many of the electoral rights now taken for granted. 'Universal suffrage', which is rarely universal in practice, is a creature of the twentieth century. Only with the 1918 Representation of the People Act in the United Kingdom, for example, did most men over twenty-one obtain the vote, together then with women over thirty, who were not treated equally with male electors in regard to age until 1928; in Switzerland, many women went on waiting for the vote until 1991. Another recent candidate for universal application is the secret ballot; in 1948, the Universal Declaration of Human Rights also contemplated 'equivalent free voting procedures', a phrase not found in article 25 of the 1966 Covenant on Civil and Political Rights.<sup>2</sup> Similarly, the current emphasis on voter registration and the prohibition of 'gerrymandering'<sup>3</sup> were accepted only belatedly in some of the so-called established democracies, including Northern Ireland and the southern United States.

Changes happen fast, however. In 1989, for the first time a revolutionary government that had come to power after a protracted armed struggle 'voluntarily' ceded power to the victor in an internationally monitored election.<sup>4</sup> In other regions, the process of democratization is gathering

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<sup>1</sup> See below, sections 2.2 and 2.4.

<sup>2</sup> But see section 7 of the CSCE Copenhagen Document; below, section 2.6.

<sup>3</sup> The word comes from Governor Elbridge Gerry, for his division of an electoral district in Massachusetts in 1812 for party purposes.

<sup>4</sup> See Council of Freely Elected Heads of Government, *Observing Nicaragua's Elections, 1989-1990*. Special Report #1, (1990), 34.

momentum, although in many cases it may be some time before the people find faith in the new institutions.

## 1.1 Outline of the Study

This study aims to present the international law dimensions to the *criteria* and *conditions* for the conduct of free and fair elections, showing what States have assumed in the way of obligation, and what may be required to ensure that such obligations are effectively implemented. The primary focus is on elections for legislative bodies, and only incidentally on presidential elections and referenda. Also, the study does not deal in detail with the choice of *electoral system*, that is, with the relative merits of majoritarian and proportional representation schemes. Although that choice bears directly on the 'value' of the vote and on the character of the legislature, it has for long been considered to fall exclusively within the realm of domestic jurisdiction. In other cases, the study does try to identify the acceptable range of variation in this area which is so clearly dominated by historical, cultural, political and social factors, and so close to the essential idea of the State as sovereign entity.

The study is divided into four principal sections. Following the present Introduction, Section 2 examines the international law background to the concept of free and fair elections, the relevance of the principle of self-determination, and the treatment accorded the subject by universal and regional human rights treaties. Bearing in mind the importance of *practice* in standard-setting, what States and others actually say and do, the section winds up with a brief review of recent UN, IPU and regional activity.

Section 3, which constitutes the bulk of the study, examines the 'constituent elements' in a system of free and fair elections: law and administration, including constituency delimitation and electoral commissions; voter rights and voter registration; civic education and voter information; candidates, political parties and political organization; electoral campaigns, including human rights and the election environment, media access and coverage; balloting, monitoring and results; and briefly, complaints and dispute resolution. The section finishes with a summary evaluation of recent experience in the field of election observation, showing wherever possible the commonality of principles and standards between established and emergent democracies.

Finally, Section 4 attempts to bring together the essential elements which international law proposes as the basis for a system of representative government, founded on periodic, free and fair elections. At the same time, due regard is paid to the self-evident truth that there is no single electoral model suitable for every country, but that each must forge the system most appropriate to realising the will of the people in a particular social, historical and cultural context. This section is roughly divided between principles and

process, identifying, on the one hand, the area of absolute or qualified obligations; and, on the other hand, the mechanisms of implementation, the details of which may vary between States, but whose objectives are essentially the same.

## 1.2 Sources

A number of quite different ‘sources’ have been used in the course of this study and call for explanation, if only to signal awareness of the distinction between what the law is and what the law ought to be.

First, the study draws in particular upon relevant *international texts*, the most important of which are reproduced in the Annex. They include treaties, which establish international obligations between the parties; formal declarations by States in international and regional bodies; and resolutions, such as those adopted by the UN General Assembly. Secondly, selected practice is used, the material sources for which include State legislation, the practice of international organizations, executive and judicial decisions. Thirdly, as ‘secondary’ evidence, the reports of United Nations, Commonwealth and other international observer missions sent to ‘verify’ or monitor the conduct of elections have been relied on, focusing on situations of transition from one-party authoritarian rule to a multi-party system, or on the implementation of the election component in internationally-brokered peace arrangements. Although international observer missions are increasingly a subject for standard-setting,<sup>5</sup> the value of such reports clearly varies. Where appropriate, the terms of reference of such mission are described, together with their findings on local law and practice. At their best, which often means where corroborated, election observer reports give clear information on law and administrative practice, indicating also the extent to which the *State* does or does not conduct itself in the elections context in accordance with international rules and standards, and whether the national process as a whole approaches the ideal of a free and fair election. It must be emphasized that international law gives no right to observe an election, and does not require any State to submit its electoral process to a system of international ‘validation’; neither is it the case, however, that national elections are still exclusively a matter for the reserved domain of domestic jurisdiction.<sup>6</sup>

<sup>5</sup> See, for example, Norwegian Helsinki Committee. Norwegian Institute of Human Rights. *Manual for Election Observation*. Mimeo. Draft. Oslo, (1993); and below.

<sup>6</sup> See Gros Espiell, H., ‘Liberté des Elections et Observation Internationale des Elections’ Mimeo., Conférence internationale de la Laguna, Tenerife, 27 févr.-2 mars 1994. Following a review of the Inter-American System in particular, he concludes: ‘Dans le droit international d’aujourd’hui tant sur le plan universel que, selon le cas à l’échelle régionale, européenne et américaine, l’organisation d’élections libres, authentiques, pluralistes et périodiques, constitue une obligation internationalement exigible. Cette question est sortie du cadre exclusif de la juridiction interne et du domaine réservé aux Etats.’

## 2. THE INTERNATIONAL LAW BACKGROUND

Before reviewing in more detail the provisions of international and regional human rights instruments relating to elections, two preliminary issues call for comment: First, the nature of the international obligations involved; and secondly, the relationship of international election norms to the principles of self-determination and sovereignty.

### 2.1 International obligations

The individual's right to take part in government, either directly or through freely chosen representatives, and the principle that the will of the people shall be expressed in periodic and genuine elections, reflect a combination of what are called 'obligations of conduct' and 'obligations of result'.<sup>7</sup> With regard to the former, States undertake to achieve a specific goal, but enjoy substantial choice of means in determining which path they will follow to reach the internationally required objective. Whether a State has fulfilled an obligation of conduct depends on the means chosen for implementation, but also on what actually happens in practice; hence the critical importance of election monitoring. The standard of achievement remains an international one, however, while the choice of means in the electoral field is significantly *structured* by the specific reference in the key human rights instruments to underlying principles of non-discrimination, universal and equal suffrage and secret ballot.

### 2.2 Self-determination and national sovereignty

The modern concept of self-determination established itself firmly in the anti-colonialist practice of the United Nations. The UN Charter, for example, declares the basic objectives of the trusteeship system to include promoting the progressive development of the inhabitants of the trust territories 'towards self-government or independence as may be appropriate to the particular circumstances of each territory and its peoples *and the freely expressed wishes of the people concerned*'.<sup>8</sup> Today, a number of commentators see the principle of self-determination as having both an external and an internal aspect. Cassese has thus described 'internal' or 'political self-determination' as meaning, among other matters, that a people in a sovereign State can elect and keep the government of its choice.<sup>9</sup> He notes that the San Francisco Conference on International Organization in 1945 spoke of self-determination as reflecting

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<sup>7</sup> See above, Part 1, *Free and Fair Elections: Further Steps along the Democracy Road*, section 3.

<sup>8</sup> Art. 76(b), UN Charter.

<sup>9</sup> Cassese, A., 'Political Self-Determination - Old Concepts and New Developments,' in Cassese, A., ed., *UN Law/Fundamental Rights*, (1979), 137-65.

the 'free and genuine expression of the will of the people',<sup>10</sup> but that the political context of such views was not broad enough at the time to include a claim to representative or democratic government

In later years, self-determination played a major part in the ball-game between 'socialist' and 'western' approaches to international relations, with emphasis in the UN falling then on colonialism and racist regimes. In due course, article 1 common to the 1966 Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, appeared to acknowledge a broader field of application for the principle:

'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.'

The scope and terminology remain ambiguous, however. Did this provision apply only to the rapidly diminishing number of peoples under colonial rule? Or was it a statement of the entitlement of all peoples to determine their 'collective political status' through democratic means?<sup>11</sup>

The 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States added a further wrinkle to the fabric, with its implicit conditioning of self-determination on possession of 'a government representing the whole people...without distinction as to race, creed or colour.'<sup>12</sup> Other references to the right of all peoples 'freely to determine, without external interference,' their political status could nevertheless be interpreted restrictively, and as saying nothing about the conditions in which that will might be expressed. Although having a particular regional focus, the Final Act of the 1975 Helsinki Conference on Security and Co-operation in Europe offered a more encompassing approach, with its implicit linkage of self-determination to democratic choice:<sup>13</sup>

'...all peoples always have the right, *in full freedom*, to determine, when and as they wish, their internal and external political status, without external interference...'

Cassese again considers it clear from the *travaux préparatoires* that this phrase represents the triumph of 'the "Western" view, whereby the right of self-determination cannot be implemented if basic human rights and fundamental freedoms are not ensured to all members of the people concerned.' Thus, there

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<sup>10</sup> See sources cited *ibid.*, 138-9.

<sup>11</sup> Franck, T.M., 'The Emerging Right to Democratic Governance,' 86 *American Journal of International Law* 46, 58-9 (1992) (hereafter, Franck, 'Democratic Governance').

<sup>12</sup> UNGA res. 2625(XXV), 24 Oct. 1970, Annex, Principle (e); Cassese, above note 9, at 143.

<sup>13</sup> Helsinki Conference on Security and Co-operation in Europe, 1975, Principle VIII; text in 1975 *Digest of United States Practice in International Law*, pp. 8, 10.

can be no 'real choice' under an authoritarian government, or in the absence of freedom from internal interference such as oppression. What the Helsinki Conference brought to the fore was the 'anti-authoritarian, democratic thrust of self-determination.'<sup>14</sup>

Leaving aside the problematic disregard of the claims of minorities, the general argument can be supported by reference to Article 7 of the 'Algiers Declaration on the Rights of Peoples,' adopted in 1976 by an *ad hoc* non-governmental conference, which proclaims the 'right to have a democratic government representing all the citizens without distinction as to race, sex, belief or colour'.<sup>15</sup> To the representative non-racist government would now be added a non-discriminatory, democratic and human rights-protecting dimension.<sup>16</sup> In Cassese's words,<sup>17</sup>

'internal political self-determination does not mean generic self-government, but rather (a) the right to choose freely a government, exercising all the freedoms which make the choice possible (freedom of speech, or association, etc.) and (b) the right that the government, once chosen, continues to enjoy the consensus of the people and is neither oppressive nor authoritarian.'

Other commentators are more sanguine, particularly where the 'rights of peoples' appear to be set against the rights of States at a certain normative level. Brownlie, for example, recognizes a 'core of reasonable certainty' in the principle: 'the right of a community which has a distinct character to have this character reflected in the institutions of government under which it lives'.<sup>18</sup> He doubts, however, that States have accepted rules going beyond this point, particularly when practice and the level of obligation at inter-State level are reviewed.<sup>19</sup> While accepting that self-determination is a right of 'peoples', rather than governments, Crawford nevertheless considers it 'axiomatic that international law does not guarantee representative, still less democratic

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<sup>14</sup> Cassese, above note 3, 152-3.

<sup>15</sup> Text in Cassese, A. and Jouve, E., eds., *Pour un droit des peuples: Essais sur la Déclaration d'Alger*, (1978), 27-30. Art. 7: 'Tout peuple a droit à un régime démocratique représentant l'ensemble des citoyens, sans distinction de race, de sexe, de croyance ou de couleur et capable d'assurer le respect effectif des droits de l'homme et des libertés fondamentales pour tous.' (emphasis supplied).

<sup>16</sup> Cf. Gaja, G., 'L'autodetermination politique dans la Déclaration d'Alger: objectifs et réalités,' in Cassese, A. & Jouve, E., eds, *Pour un droit des peuples*, (1978), 124: 'Dans la mesure où un droit est véritablement attribué au peuple...l'existence d'un régime démocratique doit également être considérée comme nécessaire pour que le gouvernement puisse exercer le droit appartenant au peuple. En d'autre termes, le peuple n'est représenté par le gouvernement que si le régime a un caractère démocratique.'

<sup>17</sup> Cassese, 'Self-Determination,' above note 3, 154. See also Cassese, A., 'The Self-Determination of Peoples,' in Henkin, L., ed., *The International Bill of Rights-The International Covenant on Civil and Political Rights*, (1981), 92-113, at 97; Steiner, H.J., 'Political Participation as a Human Right,' 1 *Harv. HRY* 77-134 (1988).

<sup>18</sup> Brownlie, I., 'The Rights of Peoples in Modern International Law,' in Crawford, J., ed., *The Rights of Peoples*, (1988), 1, at 5.

<sup>19</sup> *Ibid.*, at 12.



governments'.<sup>20</sup> On the other hand, '[t]o the extent that it applies, it qualifies the right of governments to dispose of the 'peoples' in question in ways which conflict with their rights to self-determination.'<sup>21</sup>

The precise relationship of self-determination and 'election rights' will remain controversial, so long as the connection is seen as likely to 'internationalize' political opposition. Not surprisingly, a number of States use self-determination in self-defence against increasing international and United Nations activity in the election field. For example, allegations of irregularities in the 1986 Mexican elections were brought before the Inter-American Commission on Human Rights, claiming violation, among others, of the free exercise of political rights set forth in the 1969 Pact of San José. The Government of Mexico argued that the Commission had no jurisdiction to give a decision on electoral processes, for reasons of national sovereignty and the right of self-determination. The Commission disagreed, holding that by having signed and ratified the Convention, Mexico had consented to certain aspects of its internal jurisdiction being subject to judgment by organs set up to protect the rights recognized:

'The IACHR is also empowered to verify, with respect to those rights, if the holding of periodic, authentic elections, with universal, equal, and secret suffrage takes place, within the framework of the necessary guarantees so that the results represent the popular will, including the possibility that the voters could, if necessary, effectively appeal against an electoral process that they consider fraudulent, defective and irregular or that ignores the "right to access, under general conditions of equality, to the public functions of the country".'<sup>22</sup>

The objection of sovereignty nevertheless continues to be raised. United Nations General Assembly resolution 46/130, for example, on 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes,' seeks to reaffirm that,

'it is the concern solely of peoples to determine methods and to establish institutions regarding the electoral process, as well as to determine the ways for its implementation according to their constitution and national legislation.'<sup>23</sup>

<sup>20</sup> Crawford, J., 'The Rights of Peoples: "Peoples" or "Governments"?' in Crawford, J., ed., *The Rights of Peoples*, (1988), 55.

<sup>21</sup> *Ibid.*, at 59.

<sup>22</sup> Final Report on Cases 9768, 9780 and 9828: Inter-American Commission on Human Rights 97, OEA/Ser. L/V/II.77, doc. 7, rev. 1 (1990); Buergenthal, T. and Norris, R.E., eds., *Human Rights: The Inter-American System*, Pt. 3, Cases and Decisions, (1993), 97.

<sup>23</sup> UNGA res. 46/130, 17 Dec. 1991, adopted by 102 votes in favour, 40 against, with 13 abstentions. See further below, section 2.4; and for more recent developments, see above, Part 1, section 2.2.

The same words were adopted in the equivalent resolutions for 1992 and 1993, save that the most recent version added the significant qualifier, ‘that, consequently, States should establish the necessary mechanisms and means to guarantee full popular participation in these processes.’<sup>24</sup>

The international ‘election rights’ that are the subject of this paper are not new, however.<sup>25</sup> They represent the developed content of rights already established, although it cannot be excluded that this process of consolidation will have novel consequences in other areas of international law and organization, such as sovereignty, legitimacy, membership and international representation. In its internal aspect, self-determination can be read as stating the same objective as is reflected in the principle of free and fair or genuine elections that the will of the people shall be the basis of the authority of government. In view of its ambiguous provenance, however, the principle of self-determination may best be left aside for the present, at least so far as it may permit a deductive argument for electoral rights. Rather, attention should be paid to those specific obligations in the matter of elections already assumed by States, and to the equally accepted political human rights that may reasonably be linked thereto. In the final analysis, to say that a nation enjoys or does not enjoy the right of self-determination may be no more than a validating or invalidating judgment on a complex process.

## **2.3 Elections and human rights treaties**

### *2.3.1 Universal instruments*

Article 21 of the 1948 Universal Declaration of Human Rights, summarised above, sets out the basic premises for ‘election rights,’ which were later developed in article 25 of the 1966 Covenant on Civil and Political Rights:

- ‘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;

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<sup>24</sup> See UNGA res. 48/124, 20 Dec. 1993, para. 2, adopted by 101 votes in favour, 51 against and 17 abstentions; cf. UNGA res. 47/130, 18 Dec. 1992, adopted by 99 votes in favour, 45 against, with 16 abstentions.

<sup>25</sup> Consequently they should not fall foul of Brownlie’s strictures (‘a part of the proliferation of academic inventions of new human rights and the launching of new normative candidates by anyone who can find an audience’: ‘The Rights of Peoples,’ above note 12, at 12). Also Alston, P., ‘Conjuring up New Human Rights: A Proposal for Quality Control,’ 78 *American Journal of International Law* 607 (1984).

(c) To have access, on general terms of equality, to public service in his country.’

Such a formal provision might be of little substantive impact, however, were it not for the ‘political and campaign rights’ that are ‘critical to a meaningful election process.’<sup>26</sup> Articles 19, 21 and 22 are particularly relevant:

*Article 19*

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
  - (a) For respect of the rights or reputations of others;
  - (b) For the protection of national security or of public order (*ordre public*), or of public health or morals.

*Article 21*

The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

*Article 22*

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others...’

These political rights, coupled with the collective entitlement to free and fair elections, together offer a legal basis for a claim to representative government.

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<sup>26</sup> Larry Garber and Clark Gibson, *Review of United Nations Electoral Assistance 1992-93*, (Aug. 1993) (hereafter Garber & Gibson, *Electoral Assistance*), 58; cf. Franck, ‘Democratic Governance,’ at 61: ‘the essential preconditions for an open electoral process’.

### 2.3.2 Regional instruments

The idea of popular government is common also to the African Charter on Human and Peoples' Rights,<sup>27</sup> the American Convention on Human Rights,<sup>28</sup> and the European Convention on Human Rights. The Preamble to the latter Convention reaffirms the 'profound belief' of the contracting States, 'in those Fundamental Freedoms which are the foundations of justice and peace in the world and are best maintained...by an effective political democracy.' Electoral rights did not figure in the body of the Convention, however, given substantial disagreement between the Consultative Assembly and the Committee of Ministers.<sup>29</sup> A much watered-down provision eventually appeared in the First Protocol, article 3 of which declares what was clearly intended to be a limited inter-State obligation:

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

After a period of unadventurous jurisprudence in the European Commission, the European Court of Human Rights concluded in *Mathieu-Mohin and Clerfayt* that the words of the Preamble were in fact of prime importance, since they enshrined 'a characteristic principle of democracy'.<sup>30</sup> The Court further approved the progressive development in the thinking of the European Commission on Human Rights:

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<sup>27</sup> Art. 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. 2. Every citizen shall have the right of equal access to the public service of his country. 3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.'

<sup>28</sup> Art. 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.' Art. 5 of the Charter of the Organization of American States declares the duty of members to promote the effective exercise of representative democracy; this has been reaffirmed in subsequent resolutions and also used as the basis for criticism of members considered to be in breach. See Franck, 'Democratic Governance,' 65-6.

<sup>29</sup> See Goy, R., 'La garantie européenne du droit à de libres élections législatives: l'article 3 du premier protocole additionnel à la Convention de Rome' 5 *Revue de droit public* 1275 (1985), (hereafter, Goy, 'La garantie européenne du droit à de libres élections législatives'), for a fascinating and illuminating account of debates within the Consultative Assembly, the Committee of Ministers and related committees.

<sup>30</sup> Ser. A, No. 113, para. 47. See also J.G. Merrills, *The Development of International Law by the European Court of Human Rights*, (1988), 115-35; J.E.S. Fawcett, *The Application of the European Convention on Human Rights*, (2nd ed., 1987), 416-8.

‘From the idea of an “institutional” right to the holding of free elections...the Commission has moved to the concept of “universal suffrage”...and then, as a consequence, to the concept of subjective rights of participation – the “right to vote” and the “right to stand for election to the legislature”...’<sup>31</sup>

The failure to express an *individual* right can nevertheless have serious implications from the perspective of enforcement. The key elements in article 3 are the words ‘free’, ‘reasonable intervals’, ‘secret ballot’, and ‘free expression of the people’. It does not therefore prescribe any particular form or system for elections,<sup>32</sup> and does not exclude the freedom of States to qualify exercise of the right to vote or related freedoms, such as free expression of opinion under article 10 of the Convention,<sup>33</sup> provided ‘the conditions do not curtail the rights in question to such an extent as to impair their very existence and deprive them of their *effectiveness*.’<sup>34</sup>

The European system had to work its way towards recognizing the individual rights dimension in the electoral context. The 1966 Covenant on Civil and Political Rights, the OAS Convention and, to a lesser extent, the African Charter, made that clear from the start. As is shown below, the general

<sup>31</sup> Ser. A, No. 113, para. 51; see also Goy, ‘La garantie européenne du droit à de libres élections législatives’, 1311, 1314.

<sup>32</sup> Although the principle of equality of treatment necessarily applies to Protocol 1, art. 3, the European Court considered that this does not imply ‘that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate “wasted votes”.’ The Court also emphasized the relevance of context: ‘any electoral system must be assessed in the light of the political evolution of the country concerned...features that would be unacceptable in the context of one system may accordingly be justified in the context of another.’: *ibid.*, para. 54. During drafting, both the United Kingdom and Belgian delegates were concerned to protect non-representative institutions in their parliaments, namely, the hereditary House of Lords and a nominated Senate. The European Commission has also observed that at the time of drafting, both majoritarian and proportional representation systems were part of the ‘common heritage of political traditions’ referred to in the Preamble; see Application 7140/75, *X v. United Kingdom: 7 Decisions and Reports* 95; Application 8765/79, *Liberal Party v. United Kingdom: 21 Decisions and Reports* 211. For recent developments in the doctrine, see above, Part 1, *Free and Fair Elections: Further Steps along the Democracy Road*, sections 3.5, 4.

<sup>33</sup> In the *Handyside* case, the European Court referred to the ‘demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”’. This means...that every “formality”, “condition”, “restriction” or “penalty” imposed [in the sphere of art. 10] must be proportionate to the legitimate aim pursued’: Ser. A., No. 24, para. 49. See also the *Lingens* case: Ser. A, No. 103; the freedom of the press is not just about conveying information, but also extends to comment and criticism of politicians; *Oberschlick v. Austria*, Case No. 6/1990/197/257, European Court of Human Rights, 23 May 1991.

<sup>34</sup> *Ibid.*, para. 52, emphasis added. Strictly speaking, in its earlier interpretations, art. 3 did not guarantee a right to vote. In Application 1065/61: 4 *Yearbook* 268, Belgian citizens resident in the Congo complained that they were denied participation in elections in Belgium. The Commission found their claim incompatible with the Convention, since the right to vote was not as such guaranteed: ‘the Contracting States may...exclude certain categories of citizen, such...as overseas residents, from the vote, provided such exclusion does not prevent the free expression of the opinion of the people in the choice of the legislature.’ Such limitations, however, must also be consistent with other provisions of the Convention. The way was thus open and in 1975, on applications from Belgium and the United Kingdom, the European Commission revised its approach, to hold that art. 3 did in fact give rise to an individual right to vote or to offer oneself as a candidate, which was necessarily implied by recognition of the principle of universal suffrage: see citations in Goy, ‘La garantie européenne du droit à de libres élections législatives’, 1314.

principles relating to State responsibility in regard to elections are widely reflected in the practice of States throughout the world, and have been integrated in the supervision, observation and monitoring activities of the United Nations and non-governmental organizations. What also emerges is a picture of how the principle of effectiveness of obligations provides the means to accommodate cultural, historical and political variations within a process that remains formally committed to the objective of ‘free and fair elections.’

## 2.4 United Nations election activities

UN human rights institutions are only now beginning to make progress in developing the political rights, but activities such as election monitoring and technical assistance at the field level are already contributing significantly to State practice, and thus also to the consolidation of norms and standards.

United Nations election activities can take a number of forms, ranging from the actual organization and conduct of elections, as in Cambodia, to the provision of technical assistance. The *Comprehensive Settlement Agreement* for Cambodia is an *international* agreement, which illustrates in broad strokes the minimum conditions considered by the international community as necessary for the conduct of free and fair elections. The goal of the civilian and military arrangements was, first, to establish a politically neutral and peaceful environment for elections to a constituent assembly, which in turn were a step towards the emergence of Cambodia as a country following ‘a system of liberal democracy, on the basis of pluralism. It will provide for periodic and genuine elections... universal and equal suffrage... voting by secret ballot ... [and] a full and fair opportunity to organize and participate in the electoral process.’<sup>35</sup>

The *Agreement* provided that the election was to be held on a provincial basis, in accordance with a system of proportional representation and party lists. All Cambodians aged eighteen, including Cambodian refugees and displaced persons, were entitled to take part and to vote. Political parties could be formed by any group of five thousand registered voters, but party platforms had to be consistent with the principles and objectives of the *Agreement*. Voting was to be by secret ballot, with provision made for the disabled and those who could not read or write. At the campaign level, it was provided that ‘the freedoms of speech, assembly and movement will be fully respected. All registered political parties will enjoy fair access to the media, including the press, television and radio.’<sup>36</sup> Further detail and practical guidance were provided in the Electoral Law and the Code of Conduct for Political Parties laid down by the United Nations. So far as the latter were the products of UN and

<sup>35</sup> For text of the Comprehensive Settlement Agreement, see 31 *Int. Leg. Mat.* 180 (1992).

<sup>36</sup> Comprehensive Settlement Agreement, Elections Annex (Annex 3): *ibid.*

individual expert contributions, their normative significance is nevertheless strengthened by their acceptance by Cambodia and in the international endorsement that followed the election and its results.<sup>37</sup>

The UN has also been engaged in *supervision*, for example, in Namibia, in a situation of decolonization in which all steps of the procedure, political and electoral, required ‘certification’.<sup>38</sup> This included assessing the impartiality of the electoral authorities, freedom of organization and expression for political parties, political party observers at various stages of the electoral process, and fair access to the media, among others.

At the request of the government of a sovereign State, the UN may undertake *verification*; the electoral process is managed by a national agency, and the UN is asked to ‘verify’ the freedom and fairness of specifically defined aspects, or at different stages. The Secretary General sent observers, for example, to monitor the work of the Supreme Electoral Council in Nicaragua in 1989, at the request of the government but also in the context of the Esquipulas II peace process.<sup>39</sup> Amongst other matters, the parties involved undertook to adopt measures guaranteeing the participation of political parties in the electoral process, to ensure free access to means of communication and to protect freedom of association and expression.

More controversial, so far as no international or peace process was involved, was the UN verification mission to Haiti to monitor the elections of December 1990. Besides observing political rallies and the balloting procedure, the UN also provided technical assistance in the form of information and civic education;<sup>40</sup> China, Cuba and Colombia opposed the UN’s involvement in election monitoring in a sovereign State, arguing that it constituted a violation of article 2(7) of the UN Charter,<sup>41</sup> and many States continue to insist that there is *no* ‘universal need for the United Nations to provide electoral assistance’.<sup>42</sup>

<sup>37</sup> See IPU, ‘Report of IPU Election Observer Mission, Cambodia, 16 May-4 June 1993,’ Geneva, (1993); *Bulletin de l’Assemblée Nationale*, (Paris), no. 7 du 8 juin 1993, 44.

<sup>38</sup> See UN/UNDP: *Guidelines on Special Arrangements for Electoral Assistance*, (Aug. 1992); also Report of the Secretary General: UN doc. A/46/609, 19 Nov. 1991.

<sup>39</sup> See Council of Freely Elected Heads of Government. *Observing Nicaragua’s Elections, 1989-1990*; Garber and Gibson, *Electoral Assistance*, 19. The General Assembly approved the mission in UNGA res. 44/10, the first time the UN had monitored an election in a Member State; see also United Nations, *Establishment and Terms of Reference of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua (ONUSVEN)*: UN doc. A/44/375 (1989).

<sup>40</sup> Garber & Gibson, *Electoral Assistance*, 19; Franck, ‘Democratic Governance,’ 72-4.

<sup>41</sup> Franck rejects this argument, citing the opinion of the International Court of Justice on the issue of commitments binding a nation to electoral standards. The Court said that it could not ‘discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization.’ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, 1986 ICJ Reports 14, 141; cited in Franck, ‘Democratic Governance,’ at 81.

<sup>42</sup> See, for example, UNGA res. 48/124, 20 Dec. 1993, para. 4.



Such a high degree of UN involvement requires a specific mandate from the General Assembly, and election organization, supervision and even verification remain *exceptional* activities. United Nations guidelines also emphasize that before becoming involved, there should be a clear *international* dimension,<sup>43</sup> monitoring should cover the entire electoral process, geographical and chronological, from registration to election, there should be a specific request from the government and broad public support, and the electoral process should conform to the relevant principles of international human rights law, due account being taken of local customs and political practices.<sup>44</sup> Less extensive UN involvement may include the provision of support for international observation, ‘follow and report’ by a UN representative on the spot,<sup>45</sup> and the provision of electoral assistance, such as analysis, advice, equipment and training.<sup>46</sup> A continuing role for the UN in the democratization process is nevertheless clearly called for in the 1993 Vienna Declaration and Programme of Action:

‘Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing...The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.’<sup>47</sup>

#### 2.4.1 *Action in the UN General Assembly*

In resolution 46/137, adopted on 18 December 1991 by 134 votes in favour, 4 against<sup>48</sup> and 13 abstentions, the UN General Assembly decided that the Secretary General should establish a focal point to ensure consistency in handling requests for electoral assistance, a post that was later to be assisted by the

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<sup>43</sup> Report of the Secretary-General, *Enhancing the effectiveness of the principle of periodic and genuine elections*: UN doc. A/46/609, 19 Nov. 1991, paras. 58, 79

<sup>44</sup> See UN/UNDP: *Guidelines on Special Arrangements for Electoral Assistance*, (Aug. 1992); *Guidelines for Member States Considering the Formulation of a Request for Electoral Assistance*, n.d.

<sup>45</sup> ‘Follow and report’ was initially employed where there was a perceived need for a United Nations presence, but insufficient lead time for a full operation. The UNDP Resident Representative was generally requested by the Secretary-General to assume ‘follow and report’ responsibilities. A recent review of UN election assistance activities has recommended that the practice be abandoned: Garber & Gibson, *Electoral Assistance*, 58.

<sup>46</sup> The UN Centre for Human Rights, for example, provided analytical reports following missions to Albania in 1990, Romania in 1990 and 1992, Lesotho in 1991, and Malawi in 1993. In 1994, the Centre scheduled for publication a handbook on the legal, technical and human rights aspects of elections.

<sup>47</sup> UN doc. A/CONF.157/23, paras. 8, 23.

<sup>48</sup> Those voting against were Cuba, the Democratic People’s Republic of Korea, Kenya and Namibia. Namibia later advised that it had intended to vote in favour. Already in 1988, in res. 43/157, ‘Enhancing the effectiveness of the principle of periodic and genuine elections,’ the General Assembly had invited the Commission on Human Rights to report on how the UN might support electoral processes while respecting the sovereignty of States.



*Electoral Assistance Unit*, effective 1 April 1992.<sup>49</sup> That resolution reiterated the language of the basic principles set out above: the right of everyone to take part in the government of their country, directly or through freely chosen representatives, the right of equal access to public service, that the will of the people is the basis of the authority of government, and that this will shall be expressed in periodic and genuine elections, by universal and equal suffrage held by secret vote. Such elections are ‘a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed’; and ‘determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in cooperation with others...’

At the same time, the General Assembly recognized that there is no single political system or electoral method equally suited to all nations. Moreover, the efforts of the international community,

‘to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.’

The 1992 and 1993 resolutions were both adopted without a contrary vote, each recognizing that ‘the fundamental responsibility for ensuring free and fair elections lies with Governments’.<sup>50</sup>

Similar concerns have been reiterated in a series of ‘parallel’ resolutions, beginning with resolution 46/130 on ‘Respect for the principles of national sovereignty and non-interference in the internal affairs of States in the electoral processes’, adopted on 17 December 1991 by a vote of 102 in favour, 40 against and 13 abstentions;<sup>51</sup> it emphasized that ‘electoral processes are subject to historical, political, cultural and religious factors,’ a point reaffirmed in 1992 and 1993.<sup>52</sup>

The extent to which United Nations electoral activities have contributed to the consolidation of international norms and standards is considered below. A review of such activities published in August 1993 recommended that before any UN involvement takes place, a preliminary needs assessment mission

<sup>49</sup> See Report of the Secretary-General, *Enhancing the effectiveness of the principle of periodic and genuine elections*: UN doc. A/47/668, 18 Nov. 1992, paras. 9-12 on the role of the Unit.

<sup>50</sup> UNGA res. 47/138, 18 Dec. 1992 (Kenya joined those in favour); UNGA res. 48/131, 20 Dec. 1993 (Namibia joined those in favour).

<sup>51</sup> Some of the concerns of States in favour of res. 46/130 are evident from operative para. 6, which ‘*Strongly appeals* to all States to refrain from financing or providing, directly or indirectly, any other form of overt or covert support for political parties or groups and from taking actions to undermine the electoral processes in any country.’

<sup>52</sup> See UNGA res. 48/124, 20 Dec. 1993; UNGA res. 47/130, 18 Dec. 1992.

should look at and review, among other matters, the viability of the election system, the potential for electoral manipulation, the specific requests for assistance from the government, the attitude of opposition parties to the UN or others providing assistance or monitoring, and the long-term significance of a successful election. Failure to engage in such a preliminary review could increase the likelihood of the UN becoming involved in a flawed process.<sup>53</sup> The General Assembly appears to agree; resolution 48/131 requests that the UN attempt ‘to ensure, before undertaking to provide electoral assistance...that there is adequate time to organize and carry out an effective mission...that conditions exist to allow a free and fair election and that provisions can be made for adequate and comprehensive reporting of the results of the mission’. It also recommends that, ‘in order to ensure the continuation and consolidation of the democratization process,’ the UN should provide assistance both before and after elections.

## **2.5 The Inter-Parliamentary Union: Policy and practice**

The Inter-Parliamentary Union (IPU) has been the focus for worldwide parliamentary dialogue since its founding in 1889. Besides encouraging contacts among parliamentarians, the IPU also works to improve knowledge of representative institutions and to develop and strengthen their means of action. It collects and disseminates information, prepares comparative studies and provides technical assistance to Parliaments.

In a major study on *Electoral Systems*, published in 1993, the IPU set out its thinking on elections and the democratic process by emphasizing the necessity for a reasonable link between electors and elected in whichever system of balloting a State may choose, ‘so as to avoid any possible divorce between the political class and the electorate.’<sup>54</sup> As the IPU Secretary General stated in his foreword, ‘However fair and regular an election may be, its political outcome is evidently determined by the *electoral system* that is applied.’ In reviewing the practice of some 150 countries, the IPU found that elections are usually carried out by direct universal suffrage, in which every citizen can vote unless disqualified by law. Most countries impose limitations with respect to nationality, age, and residence; at the time of the study, two States denied the franchise to a major proportion of their population, namely, blacks and women. There is also considerable variation among States in their choice of electoral system. The majoritarian approach still predominates, although different methods of proportional representation, as well as mixed systems, increasingly are being adopted. If the objective is to ensure that the elected parliament should reflect representative political forces as closely as possible, then minorities and special interest groups may need special attention; some

<sup>53</sup> Garber & Gibson, *Electoral Assistance*, 58ff.

<sup>54</sup> Inter-Parliamentary Union, *Electoral Systems: A World-Wide Comparative Survey*, Geneva, (1993), 3.

countries achieve this through constituency delimitation, or by providing for the designation of minority or group members.

In the context of its commitment to the development and strengthening of representative institutions, the IPU is increasingly engaged in election monitoring, both in its own right and indirectly through parliamentary members.<sup>55</sup> As part of its support to Parliaments, the 82nd Inter-Parliamentary Conference specifically endorsed the decision to send an IPU observer mission to 'verify the legality' of the elections in Namibia in 1989.<sup>56</sup> Its mandate on that occasion was to ascertain that all Namibians entitled to vote were properly registered and the rolls not tampered with; to observe whether all those registered were able to vote freely and that their ballots were properly and fairly counted; and to enquire whether, during the campaign and the election itself information flowed freely to and from the people so as to ensure that they were able to vote under the best possible conditions.<sup>57</sup>

Four years later the Inter-Parliamentary Council decided similarly to send a delegation to Cambodia, to observe all relevant aspects of the organization and conduct of the elections scheduled for May 1993, and to report on its observations and findings as to whether they were carried out in conformity with the UN Electoral Law for Cambodia.<sup>58</sup> The findings of both missions are incorporated in the body of the present study. As the IPU delegation to Cambodia emphasized, however, it is important not only that election observer missions witness the whole electoral process, including the campaign period, but also to recognize that 'elections are but part of a larger process which aims at ensuring participatory democracy.'<sup>59</sup>

At its April 1993 session in New Delhi, the Inter-Parliamentary Council unanimously endorsed the Union's policy and involvement in electoral processes. It welcomed cooperation with the United Nations, reaffirming 'that the Union should always seek to ensure that it is present at national elections and referenda which are organized, supervised or verified' by the UN.<sup>60</sup> The Council further urged national groups to participate in election observer missions and to provide electoral assistance, while specifically welcoming plans to undertake the present study on free and fair elections.<sup>61</sup>

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<sup>55</sup> Note that it was *parliamentarians* in the European Consultative Assembly who pushed for the inclusion of electoral rights in the European Convention on Human Rights; see Goy, 'La garantie européenne du droit à de libres élections législatives', 1278-90.

<sup>56</sup> See Resolution on Support of Parliaments to the Process of Independence in Namibia, the Holding of Free and Equitable General Elections, and the Establishment of a New Government reflecting the Popular Will, adopted by the 82nd Inter-Parliamentary Conference, Sept. 1989. Annexed to 'Report of the Mission to Observe the Elections in Namibia': IPU doc. CL/146/10-R.1, 20 Dec. 1989.

<sup>57</sup> IPU, 'Report of the Mission to Observe the Elections in Namibia,' para. 21.

<sup>58</sup> IPU, 'Report of IPU Election Observer Mission, Cambodia, 16 May-4 June 1993,' Geneva, (1993).

<sup>59</sup> *Ibid.*, paras. 61, 65.

<sup>60</sup> 'IPU's Policy and Involvement in Electoral Processes,' Resolution adopted unanimously by the Inter-Parliamentary Council at its 152nd Session, New Delhi, 17 Apr. 1993, paras. 1, 2.

<sup>61</sup> *Ibid.*, paras. 7, 8, 10.

## 2.6 Regional and other developments

One of the most extensive and coherent statements of principle with respect to elections is found in the final document issued by the Conference on Security and Co-operation in Europe Meeting on the Human Dimension in Copenhagen in 1990.<sup>62</sup> The participating States recognized that pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms. Among the ‘elements of justice’ essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are free elections held at reasonable intervals by secret ballot, government that is representative in character, in which the executive is accountable to the elected legislature or the electorate, and a clear separation between State and political parties. Section 7 of the Copenhagen Document is especially comprehensive, declaring that in order to ensure the will of the people serves as the basis of the authority of government, the participating States will,

- hold elections at reasonable intervals, as established by law;
- permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;
- guarantee universal and equal suffrage to adult citizens;
- ensure that votes are cast by secret ballot or by equivalent free voting procedure,<sup>63</sup> and that they are counted and reported honestly with the official results made public;
- respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;
- 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 or other 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;
- 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;
- 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;

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<sup>62</sup> CSCE: Document of the Copenhagen Meeting of the Conference on the Human Dimension: 29 June 1990: 29 I.L.M. 1305 (1990).

<sup>63</sup> The reason for this throwback to the Universal Declaration of Human Rights is not at all clear.

- ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to any end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

States also accepted the potential of national and foreign observers in enhancing the electoral process, stressed the importance of related ‘political rights’, and the value of cooperation and information exchange.<sup>64</sup> Although the CSCE process may fall short of the high normative character of an international treaty, cooperation has been the *leitmotif* of each meeting, the focus of which is increasingly detailed.<sup>65</sup> The fact that fifty-six States now participate in the process, many of them both adapting their laws to democratic ends and inviting international observers to attend their elections,<sup>66</sup> lends added weight to the standards emerging with respect to free and fair elections.

This conclusion is amply supported by the fact that similar ‘normative’ activities have also been undertaken by many other international actors in this field. Numerous election observation reports are quoted throughout this study, and the mainly non-governmental organizations responsible have contributed, at least indirectly, to clarifying norms through their recorded experience and recommendations. Inter-governmental organizations have also significantly increased their election-related activities. For its part, the Organization of American States adopted the ‘agreement of Santiago on democracy and the renovation of the Inter-American System’ in 1991, in which it declared its determination to ‘strengthen representative democracy as the expression of the legitimate and free manifestation of popular will, in strict respect of the sovereignty and independence of its member States’.<sup>67</sup> This was followed by the establishment of an OAS Unit for the Promotion of Democracy and enhanced involvement in electoral assistance and observation.

Also in 1991, the Commonwealth adopted the Harare Declaration which gave high priority to the organization’s promotion of its fundamental political values, defined as ‘democracy, democratic processes and institutions which reflect national circumstances, human rights, the rule of law, and just and honest government’.<sup>68</sup> The Declaration has been followed by extensive activities for assisting and observing electoral processes. The Organization of

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<sup>64</sup> Ibid., sections 8, 9, 22.

<sup>65</sup> Principle IX of the Declaration on Principles Guiding Relations between Participating States, Helsinki Final Act, 1 Aug. 1975, declared: ‘The participating States will develop their co-operation with one another and with all States in all fields in accordance with the purposes and principles of the United Nations...’ Text in 1975 *Digest of United States Practice in International Law*, pp. 8, 10.

<sup>66</sup> Some 1,000 international observers are estimated to have attended the 12 Dec. 1993 elections in Russia: US Commission on Security and Cooperation in Europe. *Russia’s Parliamentary Election and Constitutional Referendum, December 12, 1993*. Washington, D.C. (Jan. 1994), 13.

<sup>67</sup> Resolution adopted at its third plenary session on 4 June 1991.

<sup>68</sup> The Harare Commonwealth Declaration, October 1991.

African Unity has provided such assistance, observing, for example, the 1992 elections in Zambia. Most recently, and together with the Commonwealth and the European Union, the OAU has co-operated with the United Nations in observing the 1994 elections in South Africa.

### 3. FREE AND FAIR ELECTIONS

#### 3.1 Constituent Elements

At a certain level of abstraction, States are bound to conduct their internal affairs, so that ‘the authority to govern shall be based on the will of the people as expressed in periodic and genuine elections.’ The principle of effectiveness of obligations requires that States adopt laws and procedures or systems of internal organization which are conducive to and do not obstruct the attainment of particular goals established by international law. This principle in turn carries certain implications with respect to the choice of options in regard to free and fair elections, even if none can be specifically framed as an international duty. These ‘markers’ for effective implementation, the indices for free and fair elections, are nonetheless evident in the practice of established democracies and States in transition, considered in relation to the attainment or failure to attain the stated objective. For the purposes of the present study, the requisite activities and criteria have been divided into the following ten broad categories: (1) Electoral law and system; (2) Constituency delimitation; (3) Election management; (4) The right to vote; (5) Voter registration; (6) Civic education and voter information; (7) Candidates, political parties and political organization, including funding; (8) Electoral campaigns, including protection and respect for fundamental human rights, political meetings, media access and coverage; (9) Balloting, monitoring and results; and (10) Complaints and dispute resolution.

##### 3.1.1 *Electoral law and system*

Regional jurisprudence and recent United Nations General Assembly resolutions recognize ‘that there is no single political system or electoral method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.’<sup>69</sup> Moreover, ‘political systems

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<sup>69</sup> See, for example, UNGA res. 46/137, ‘Enhancing the effectiveness of the principle of periodic and genuine elections,’ 17 Dec. 1991; also, UNGA res. 47/130, 18 Dec. 1992; UNGA res. 48/124, 20 Dec. 1993.

and electoral processes are subject to historical, political, cultural and religious factors'.<sup>70</sup> Whether a State adopts a majoritarian voting system or one or other system of proportional representation is thus a classic issue falling within the reserved domain of domestic jurisdiction.<sup>71</sup>

State practice confirms the variety of available choices,<sup>72</sup> and no system can be considered, from an international law perspective, to be more valid than any other, provided it bears a reasonable relationship, in law and in practice, to the internationally prescribed objective. The IPU has noted the need, among others, to strike a balance between two essential considerations: that a legislative election above all must make it possible to designate a cohesive government responsible for conducting a national policy; and that the election primarily must guarantee representation at the national level of the country's political forces, and reproduce in Parliament as faithful an image as possible of their relative strength.<sup>73</sup> The IPU has also stressed the importance of a reasonable link between the electors and the elected, reflecting those elements of proportionality<sup>74</sup> which also characterize the governing principles of international law.

The chosen system, therefore, must facilitate the expression of the will of the people through periodic and genuine elections, conducted on the basis of equal suffrage and secret ballot. 'Periodic' is yet another of those terms susceptible to varying interpretations, even among reasonable people. The *travaux préparatoires* of article 3 of Protocol 1 to the European Convention on Human Rights find expert opinion saying that the intervals between elections should be neither too short nor too long, but rather in conformity with the normal practice of free States.<sup>75</sup> Practice in turn merely confirms the generality of the condition; random samples show that representatives in the United States of America serve two-year terms; Australia and New Zealand, three years; Austria and Belgium, four years; Botswana and the United Kingdom, five years. The Inter-American Commission on Human Rights has ruled that the postponement of all elections for ten years violates the American Declaration

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<sup>70</sup> UNGA res. 46/130, 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes,' 17 Dec. 1991.

<sup>71</sup> See generally, Inter-Parliamentary Union, *Electoral Systems*, Geneva, (1993); Nadais, A., 'Choice of Electoral Systems,' in Garber, Larry and Bjornlund, Eric, eds., *The New Democratic Frontier. A country by country report on elections in Central and Eastern Europe*. National Democratic Institute for International Affairs, Washington, D.C., (1992), 190 (hereafter, Garber & Bjornlund, *New Democratic Frontier*).

<sup>72</sup> See generally, Inter-Parliamentary Union, *Electoral Systems*, Geneva, (1993).

<sup>73</sup> *Ibid.*, 3.

<sup>74</sup> 'Proportionality' is used here and in similar contexts below in its international law sense of 'bearing a reasonable relationship between the means chosen and the required result'. On proportionality and non-discrimination, see Goodwin-Gill, G.S., *International Law and the Movement of Persons between States*, (1978), 75-82. In this sense, proportionality differs from and is not intended to be a substitute for elections systems based on 'proportional representation'.

<sup>75</sup> Goy, 'La garantie européenne du droit à de libres élections législatives' 1280.



of the Rights of Man,<sup>76</sup> thereby showing how the principle of proportionality can be applied in a specific situation.

Periodic and genuine elections conducted on the basis of equal suffrage also means ‘equality of voting power’; in principle, no vote should carry disproportionately more weight than any other, but that does not *necessarily* require a system of proportional representation. On a complaint by a minority party member in the United Kingdom, the European Commission of Human Rights interpreted Protocol 1, article 3, to mean that different political parties must be given a reasonable opportunity to present their candidates for election, but did not require an electoral system which guaranteed that the total number of votes cast for each candidate or party be reflected in the composition of the legislature.<sup>77</sup>

The choice of electoral system and its implementation may nevertheless have a direct effect on related political rights. Majoritarian systems tend to favour two parties. They are relatively straightforward, but in a multi-party situation they give stability the advantage over equity in representation; not only are small or newer parties disadvantaged, but very large parliamentary majorities may be won on the basis of minor electoral victories, considered in percentage terms.<sup>78</sup> Proportional representation systems aim to allocate seats to political parties proportional to their electoral strength; however, they can encourage the proliferation of parties, and require voting on the basis of party lists, so distancing the voter from the elected and in turn limiting the opportunities for individual, non-party candidatures.<sup>79</sup> Different formulae for

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<sup>76</sup> Third Report on the Development of the Situation of Human Rights in Chile: doc. AR 1977, 77-99 (1977). Art. XX of the Declaration provides: ‘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.’

<sup>77</sup> Application 7140/75, 7 *Decisions and Reports* 95; cited in Sieghart, P., *The International Law of Human Rights*, (1983), 364 (hereafter, Sieghart, *Human Rights*). See also Goy, ‘La garantie européenne du droit à de libres élections législatives,’ 1303-8 at 1306 (in a section pertinently entitled, ‘L’absence de garantie d’une juste représentation’).

<sup>78</sup> IPU, *Electoral Systems*, 6. See also Council of Freely Elected Heads of Government and Carter Center of Emory University, *Electoral Reform in Mexico*, Occ. Paper Ser., Vol. IV, No. 1, Nov. 1993, 16-17 (hereafter Freely Elected Heads, *Electoral Reform in Mexico*).

<sup>79</sup> IPU, *Electoral Systems*, 7-8. AS the IPU study shows, mixed systems are also possible, the most comprehensive perhaps being those adopted in Germany and Hungary. In the 1990 Czechoslovak elections, parties might choose to include independent candidates on their list. The Bulgarian elections the same year featured a mixed majority and proportional representation system: US Commission on Security and Cooperation in Europe. *Elections in Central and Eastern Europe*. A Compendium of Reports on the Elections Held from March through June 1990. Washington, D.C., (July 1990), 127, 147 (hereafter US Commission, *Central and Eastern Europe 1990*). Elections in the Seychelles in July 1993 combined the majoritarian system for the presidency and two thirds of the legislature, and proportional representation for the remaining third: see *Bulletin de l’Assemblée Nationale*, no. 14 du 5 oct. 1993, 61. In Russia’s 12 Dec. 1993 elections, half the 450 seats in the *duma* were assigned to single member constituencies decided on a simple majoritarian vote, and half were decided according to a system of proportional representation. See US Commission on Security and Cooperation in Europe. *Russia’s Parliamentary Election and Constitutional Referendum, December 12, 1993*. Washington, D.C. (Jan. 1994), 7 (hereafter, US Commission, *Russia 1993*).



the allocation of votes and seats can also significantly affect representation in the legislature, and may be adopted to ensure that no single party obtains a majority,<sup>80</sup> to maintain an urban-rural bias,<sup>81</sup> to ensure other 'balances',<sup>82</sup> or to guarantee minority or sectional representation.<sup>83</sup>

The principle of equal suffrage nevertheless applies also to 'threshold' requirements, which can be and are used to deny representation to parties that fail to secure a prescribed percentage of the overall vote.<sup>84</sup> Such criteria are commonly used to reduce the numbers of small or sectional interests in the legislature and to enhance the prospects for the formation of a viable government.<sup>85</sup> Unless compensatory steps are taken,<sup>86</sup> however, this technique can effectively disenfranchise substantial minorities. International standards nevertheless constrain and structure the choices available to States. The underlying obligation of result, combined with principles of equality, reasonableness and proportionality, can be used to mediate between the objective and the means chosen, and to show whether the system and its implementation in practice conform to what is required by international law. In short, the State is not free to use the 'valid' electoral technique of the

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<sup>80</sup> This appears to have been the stated aim of the voting system adopted for the Jordanian elections in Nov. 1993; cf. Antoine Boshard, 'Un résultat bien orchestré,' *Journal de Genève*, 10 nov. 1993, p. 3.

<sup>81</sup> In Egypt, half of the 444 elected members must be labourers or farmers: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 25, 1990-1991, 65-6. See also Brick, A., Gastil, R. & Kimberling, W., *Mongolia: An Assessment of the Election to the Great People's Hural. June 1992*. International Foundation for Election Systems. Washington, D.C., (1992), 9, 17 (hereafter Brick, Gastil & Kimberling, *Mongolia 1992*). With respect to Zambia, see below note 94 and accompanying text.

<sup>82</sup> In Tonga, for example, only nine of 30 seats in parliament are open to election by the country's 45,000 voters. Twelve seats are occupied permanently by the King and the 11-member Privy Council/Cabinet, and nine are reserved for and elected by the country's 'hereditary nobles': *Keesing's Record of World Events*, News Digest for February 1993. The House of Representatives in Fiji consists of 70 members elected for 5 years, of whom 37 are elected by voters on the Fijian communal roll, 27 by voters on the Indian communal roll, one by voters on the Rotuman communal roll and 5 by voters on the General communal roll: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 26, 1991-1992, 71.

<sup>83</sup> In Iran, for example, Zoroastrians, Jews, Assyrian and Chaldean Christians and Armenian Christians of the South and North are all guaranteed one representative: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 26, 1991-1992, 83; in New Zealand, four of the 97 electoral districts are set aside for representatives of the Maori race (who make up 12 per cent of the population): *ibid.*, No. 25, 1990-1991, 111; the Cypriot constitution provides for power sharing between Greek and Turkish populations in proportion to their numbers: *ibid.*, 57; both Bangladesh and Tanzania guarantee seats for women: *ibid.*, 37, 123; in Lebanon, voters vote for lists which take account of the division of seats between the different religious communities: *ibid.*, No. 27, 1992-1993, 135-8; in Croatia, ethnic and national minorities which constitute more than 8 per cent of the population have a right to representation proportional to their numbers: *ibid.*, 71-4; in Romania, legally constituted organizations of citizens belonging to a national minority which has not obtained at least one Deputy or Senator have the right to a Deputy's seat if they have obtained throughout the country at least 5 per cent of the average number of validly expressed votes: *ibid.*, 181-5.

<sup>84</sup> The IPU *Electoral Systems* survey found thresholds ranging from 0.67 per cent in the Netherlands, to 8 per cent in Liechtenstein.

<sup>85</sup> For example, the 5 per cent threshold in Russia's 1993 elections was intended precisely to keep out small, 'troublesome' parties: US Commission, *Russia 1993*, 4.

<sup>86</sup> Cf. the examples given in note 83 above.

threshold requirement in order to bar particular groups from representation in Parliament.

The choice of *system* reveals a wide disparity, or even richness, of practice. In many cases, the choice is not so much the result of conscious legislative decisions, as the product of a particular historical and political evolution. As such, it is not necessarily a model to be emulated out of context, although the representation aims of individual systems may appeal to countries in transition, where popular consensus on the democratic approach to government is still lacking. The general and distant objective set by international law — genuine periodic elections guaranteeing the free expression of the will of the electors, which shall be the basis of the authority of the government — allows considerable room for variation. Whether an electoral system departs from the permissible range is most likely to be answered by reference to other peremptory international law principles, such as non-discrimination. Does the ‘variation’ have the intent or effect of disenfranchising or devaluing the voting power of particular sections of the population for reasons that ought to be irrelevant to the exercise of political rights, such as race, religion, national or social origin, sex, language, political or other opinion, association with a national minority, birth or other status? If so, then to that extent the electoral system is potentially in breach of international law.

### 3.1.2 *Constituency delimitation*

Constituency delimitation, or ‘districting’, raises similar considerations with respect to purpose, intent and effect, in an area of some flexibility. ‘Representation by population’ is as central to the concept of democracy as is the notion of equality of voting power; the question is whether absolute or near-absolute equality is called for; or whether relative equality of voting power will suffice. The United States Supreme Court, for example, held that the equal protection clause rendered unconstitutional a state districting scheme for congressional elections, because it failed to provide for equality of voters in each district;<sup>87</sup> in another instance, a disparity as small as 0.6984 per cent was also held unconstitutional.<sup>88</sup>

Other States are more pragmatic, recognizing the importance of population, but also the relevance of other factors. A 1986 decision of the French *Conseil constitutionnel*, for example, confirmed constituency delimitation criteria which included the principle that population differences within a single *département* must not exceed 20 per cent of the departmental

<sup>87</sup> *Reynolds v. Sims* (1964) 12 L.Ed.(2d) 506, 536; the disparity here was as high as 41-1, however.

<sup>88</sup> *Karcher v. Daggett* (1983) 77 L.Ed.(2d) 133. Variations tend to be tolerated more at the level of state or local legislature; see *Mahon v. Howell* (1973) 34 L.Ed.(2d) 320; *Gaffney v. Cummings* (1973) 37 L.Ed.(2d) 298.

average.<sup>89</sup> In the United Kingdom, Boundary Commissioners are required to draw constituency limits so as to come as close as possible to a regional average quota.<sup>90</sup> A Canadian decision in 1989 considered constituency deviations in British Columbia, which had the effect of enhancing the power of the rural vote. The Court considered that ‘equality of voting power is the single most important factor to be considered in determining electoral boundaries,’ but that ‘relative equality of the number of voters per representative’ was called for. The justifications put forward by the government on this occasion were held inadequate, however, and in some cases, ‘it was difficult to see how they could conform to the principle that population must be the primary criterion.’<sup>91</sup> More recently, the Supreme Court of Canada has stressed that the purpose of the right to vote in section 3 of the *Charter* is not equality of voting power, so much as the right to ‘effective representation’, of which relative parity is a prime condition, but allows geography, community history, community interests and minority representation also to be taken into account.<sup>92</sup>

Few States follow the U.S. model of absolute equality, but seek instead to accord legislative seats roughly proportional to population. Boundary changes in Mongolia for the 1992 election, for example, reversed the rural bias of the 1990 elections.<sup>93</sup> ‘Effective representation’ was supposedly taken into account in creating additional constituencies for the October 1991 elections in Zambia, specifically for areas having severe physical and communication difficulties. When setting constituency boundaries, the Electoral Commission was required to take three criteria into account: the availability of means of communication; the geographical features of the area; and the number of inhabitants. It was authorised to vary the strict application of the population quota where either of the other criteria justified such action.<sup>94</sup> A clear rural bias resulted, together with substantial variations in voter numbers, ranging from 6,376 in one

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<sup>89</sup> *Décision* no. 86-218, 16 nov. 1986.

<sup>90</sup> ECPRD, *Electoral System Legislation. National Reports: Part Two*, (May 1993), 473 (hereafter ECPRD, *Electoral System Legislation*). The quotas for 1992 were as follows: England-69,534; Scotland-54,570; Wales-58,383; Northern Ireland-67,145.

<sup>91</sup> *Dixon v British Columbia (Attorney General)* [1989] W.W.R. 393. In one example, the constituency of Atlin had 2,420 voters, while another, Coquitlam-Moody, had 36,318, making a vote in the former 15 times more valuable than a vote in the latter: ‘Such anomalies cannot but suggest a gross violation of the fundamental concept of representation by population which is the foundation of our political system.’

<sup>92</sup> *Reference Re Provincial Electoral Boundaries (Saskatchewan)* [1991] S.C.J. No. 46. See the decision to similar effect of the Australian High Court in *Attorney-General of the Commonwealth (ex rel. McKinlay) v. Commonwealth of Australia* (1975) 135 C.L.R. 1.

<sup>93</sup> Brick, Gastil & Kimberling, *Mongolia 1992*, 17. The deviation from the norm of some 13,000 voters per seat was plus or minus some 2,500, ranging from a high of some 16,000 to a low of some 11,000. Although unacceptable in the United States, ‘it is not unreasonable in the demography of Mongolia - especially considering that they tried to respect traditional political boundaries’: *ibid*.

<sup>94</sup> Commonwealth Secretariat, *Presidential and National Assembly Elections in Zambia, 31 October 1991*. Report of the Commonwealth Observer Group, (1992), 4 (hereafter Commonwealth Observer Group, *Zambia 1992*).

constituency, to 70,379 in another.<sup>95</sup> Even though all parties accepted the delimitation, such substantial variations inevitably devalued many votes.

While the principle of relative equality will ensure that votes carry more or less equal value, subject to objectively justifiable variations on the basis of local or regional conditions, clearly no rule prescribes the ideal ratio of population to representative. The International Foundation for Electoral Systems in its pre-electoral evaluation in Togo (estimated total population, 3.6 million; estimated total electorate, 1.7 million), considered that a ratio of 1:25,000 meant weak representation.<sup>96</sup> Much will depend on local conditions, however; voting districts for the Latvian elections in 1990 were tied to approximately 10,000 voters, those in Lithuania under the October 1989 laws to some 18,400;<sup>97</sup> the rule in Ireland is at least one member for every 30,000 inhabitants, and not more than 1 for every 20,000;<sup>98</sup> the representation norm for Romania in the September 1992 elections was one deputy for every 70,000 inhabitants, while average constituency size in Bangladesh for the 1991 parliamentary elections was 207,631,<sup>99</sup> and each of China's 2,978 indirectly elected deputies represented approximately 335,000 inhabitants.<sup>100</sup> The level of representation will depend not only on population and geography, but also on overall political organization. For example, federal States with functioning and effective provincial legislatures, or unitary States with highly developed systems of local government, may satisfy international standards with a relatively low ratio of representation to population.

From an international law perspective, how a State delimits its electoral boundaries remains very much a product of its overall choice of electoral system. The general aim remains the same, to translate the will of the people into *representative* government. Again, State practice and the very disparities between States themselves in terms of population, geography, distribution and

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<sup>95</sup> National Democratic Institute for International Affairs. Carter Center of Emory University. *The October 31 1991 National Elections in Zambia*. Washington, D.C., (1992), 32-3 (hereafter NDI/Carter Center, *Zambia 1991*)

<sup>96</sup> Brunet, G., Marchand, M., et Neher, L., *Togo: Rapport d'évaluation pré-électorale*. International Foundation for Election Systems, (31 mars 1992), 21 (hereafter Brunet, Marchand & Neher, *Togo 1992*). As the Canadian Court noted in *Dixon* (above note 91), 'It is not consistent with good government that one member be grossly overburdened with constituents, as compared with another member.'

<sup>97</sup> US Commission on Security and Cooperation in Europe. *Elections in the Baltic States and Soviet Republics*. A Compendium of Reports on Parliamentary Elections Held in 1990. Washington, D.C., (Dec. 1990), 22, 64.

<sup>98</sup> ECPRD, *Electoral System Legislation*, 302.

<sup>99</sup> Commonwealth Secretariat, *Parliamentary Elections in Bangladesh, 27 February 1991*. Report of the Commonwealth Observer Group, (1991), 11 (hereafter, Commonwealth Observer Group, *Bangladesh 1991*). The boundaries had been drawn in 1984, on the basis of the 1981 census, again so as to achieve broad equality of voters among constituencies and satisfaction of other criteria. Given the substantial interim changes, particularly due to population movements, the Commonwealth Observer Group recommended review.

<sup>100</sup> Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 27, 1992-1993, 59-61. The law in the Dominican Republic provides for one deputy for every 50,000 inhabitants or fraction thereof greater than 25,000: *ibid.*, No. 24, 1989-1990, 67. In Mexico, the ratio is one deputy for every 250,000 citizens, and for every fraction over 125,000: *ibid.*, No. 26, 1991-1992, 113.

resources, reveal the range of possible and permissible variations. Substantial differences in the representation/population ratio between electoral units, however, raise a number of questions. For example, does the disparity have the effect of disenfranchising a group or groups of the population, contrary to the international norm of non-discrimination? Or does the unequal division have a political impact, in the sense of affecting the outcome of an election? Either case raises the possibility of a violation of international law, although a breach will normally be determined only by what actually happens in fact.

### 3.1.3 *Election management*

In a free and fair election, an independent and impartially administered electoral process is essential. Mexican observers of the United States system in 1992 remarked on the absence of government and parties from the process, and on the degree of decentralization. They also noted the degree of *trust* in the system, which they attributed to a combination of history, active media, fear of publicity, and effective judicial remedies.<sup>101</sup> Countries in transition frequently also suffer a lack of trust among the political players; 'for a democratic election to occur, all major parties...must accept the process and respect the results.'<sup>102</sup> Experience shows that confidence is only likely where the election machinery is and appears to be impartial.<sup>103</sup>

Frequently, and particularly in established democracies, administration is handled by national and local government officials and disputes are settled by ordinary courts having a tradition of fairness and neutrality, all of whom enjoy the confidence of the electorate on that account alone. In France, for example, the local *bureau de vote* comprises a president, generally the mayor, deputy mayor or a municipal counsellor, and four assessors and a secretary, chosen from among the electors of the commune.<sup>104</sup> Local electoral committees in Norway are drawn from municipal executive boards;<sup>105</sup> those in Sweden are appointed by the municipal council;<sup>106</sup> the electoral registration officials in England and Wales are either the chief executive officers or other senior officers of local government authorities, while the returning officer responsible for administering the election will again be a senior local official, with election staff usually local government employees on temporary transfer.<sup>107</sup>

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<sup>101</sup> Freely Elected Heads, *Electoral Reform in Mexico*, 11.

<sup>102</sup> *Ibid.*, 8. Trust was the key element in the successful transfer of power in Nicaragua in 1990. All political parties undertook to accept the results, both before and after the election: Council of Freely Elected Heads of Government. *Observing Nicaragua's Elections, 1989-1990*, 25-6.

<sup>103</sup> Cf. Council of Freely Elected Heads of Government. *Observing Guyana's Electoral Process 1990-1992*, (1992).

<sup>104</sup> Masclet, J.-P., *Droit électoral*, 277-81; ECPRD, *Electoral System Legislation*, 250.

<sup>105</sup> ECPRD, *Electoral System Legislation*, 342-3.

<sup>106</sup> *Ibid.*, 428.

<sup>107</sup> *Ibid.*, 471, 473.

In very exceptional cases, such as occurred in Bangladesh in 1991,<sup>108</sup> the responsibility for an election may be conferred on a caretaker government having no commitment to any particular political party. In other situations of transition, either from conflict to peace or from a single-party to a multi-party system, positive steps will be required to generate a credible electoral process and instil the necessary confidence in all the parties.

At a practical administrative and oversight level, the institution of an independent *Electoral Commission* is now widely adopted as an important step in building traditions of independence and impartiality, and the confidence of the electorate and parties alike. Eastern European countries, including Hungary, Slovenia, Romania, Poland, Czechoslovakia and Bulgaria all established central commissions for the crucial elections of 1989-90.<sup>109</sup> Different systems were employed, including commissions made up of an equal number of representatives of parties contesting the election; party commissions with the addition of government-selected members; party representatives in proportion to the numbers of candidates fielded, plus a number of judges or jurists selected by lot; and commissions with members designated by parties involved in pre-election negotiations.<sup>110</sup>

In practice, the election machinery can either be impartial, or in balance; if impartial members who enjoy the confidence of all parties cannot be found, then balance must be created by the appointment of party representatives. In East Germany, election administration for the re-unification vote was handled by the forty-eight member National Election Commission, comprising two representatives from each of the twenty-four parties on the ballot; below it were district and local election commissions. The institution of an electoral commission was not new, but its commitment to free elections was. It rapidly established a reputation as fully independent and non-partisan, enjoyed ready access to the media, which it used in the interests of voter education, and supervised the reporting of both preliminary and final results.<sup>111</sup> In Hungary, four levels of election committee operated: national, county, constituency and polling place. Their membership comprised three non-party members appointed either by the national legislature or municipal council, together with representatives from each party with a candidate standing in the jurisdiction. The process was reported as having worked smoothly, and all parties appeared to trust the integrity of the election officials.<sup>112</sup> Bulgaria's

<sup>108</sup> Commonwealth Observer Group, *Bangladesh 1991*, 6, 28. As the Group observed, 'From this reality has flowed a neutral administration and an Election Commission ... with full command of all election staff and security personnel; an atmosphere palpably free and peaceful in the polling stations; confidence and enthusiasm among voters and candidates alike; and a campaign which was open and for the most part even exuberant.'

<sup>109</sup> Nadais, A., 'Choice of Electoral Systems,' in Garber & Bjornlund, *New Democratic Frontier*, at 190, 197-8.

<sup>110</sup> *Ibid.*, at 198.

<sup>111</sup> Gordon, D. & Reinke, F., 'East Germany,' in Garber & Bjornlund, *New Democratic Frontier*, at 32-4.

<sup>112</sup> Melia, T.O., 'Hungary', in Garber & Bjornlund, *New Democratic Frontier*, at 58.



twenty-four member Central Election Commission was headed by a well-respected law professor, not affiliated with any party. Three parties each designated one of the other three principal officers, and apportioned the 20 remaining seats among themselves.<sup>113</sup> The electoral law in Romania provided that the Central Electoral Bureau administer the elections, with authority delegated to provincial electoral bureaux. Both levels were composed of judges and party representatives, but the latter came in late. The political independence of the judges was doubtful, although the partiality of the bureaux finally was not a major issue.<sup>114</sup> In complete contrast was the situation in Czechoslovakia, where the Communist Party was already out of power and election administration fell to a coalition of dissidents whose commitment to free and fair election inspired public confidence.<sup>115</sup>

Perhaps the most striking exercise in confidence-building occurred in South Africa, where the government appointed several international members of the Independent Electoral Commission, including individuals from Canada, Zimbabwe and Eritrea.<sup>116</sup>

The ideal or most effective model will depend on the relative maturity of the national system. Where election administration previously was in government hands within a one-party or other authoritarian system with no opposition, voter confidence will only likely be inspired if opposition party representatives are co-opted into election administration. They may not be 'independent', and indeed will usually remain partisan, though ideally in balance with competing interests; at such moments, the issue is not so much *independence* as transparency and non-governmental involvement at national and polling district levels.<sup>117</sup> Later, when other government institutions acquire a reputation for impartiality and integrity, for example, when judges are seen to stand for the rule of law and not the party line, then independence alone may be a credible criterion for electoral commission membership.

<sup>113</sup> Garber, L., 'Bulgaria,' in Garber & Bjornlund, *New Democratic Frontier*, at 141.

<sup>114</sup> Carothers, T., 'Romania,' in Garber & Bjornlund, *New Democratic Frontier*, at 81. Of greater concern in the 1990 elections was the total absence of 'civil structures external and parallel to government'. This 'proved devastating to the inculcation of a free democratic process...A lack of civic education compounded the absence of civil society.' *Ibid.*, at 87-8. See also concerns expressed by the Council of Europe delegation to Lithuania in October and November 1992: CE Doc. 6724, Add. II, para. 5.3 (20 Jan. 1993).

<sup>115</sup> Carnahan, R. & Corley, J., 'Czechoslovakia', in Garber & Bjornlund, *New Democratic Frontier*, at 133.

<sup>116</sup> Independent Electoral Commission Act, s.5(2).

<sup>117</sup> This is not to say that the independence and impartiality of Commission members, particularly the Chair, are irrelevant. The Commonwealth Observer Group to the 1992 Kenya elections, for example, called attention to the 'regrettable circumstances' attaching to the appointment of the Chairman of the Electoral Commission, whose integrity was in doubt: Commonwealth Secretariat, *The Presidential, Parliamentary and Civil Elections in Kenya, 29 December 1992*. Report of the Commonwealth Observer Group, (1993), 9-11 (hereafter, Commonwealth Observer Group, *Kenya 1992*). Similarly, the report on the 1992 Ghana elections regretted that the Interim National Electoral Commission had been established and filled without consultation, let alone agreement of the parties: Commonwealth Secretariat, *The Presidential Election in Ghana, 3 November 1992*, Report of the Commonwealth Observer Group, (1992), 40-2 (hereafter Commonwealth Observer Group, *Ghana 1992*). In both cases, the institutions were able slowly to secure recognition of their impartiality. Commonwealth Observer Groups have emphasized that



The practical value of *dialogue* and *consultation* is reiterated in numerous observer reports, particularly in situations of transition. Recent analysis of electoral reform moves in Mexico found that the political parties have difficulty communicating with each other.<sup>118</sup> The Commonwealth Observer Group to the 1992 Kenya elections regretted the Government's inability to entertain any dialogue with the new opposition parties.<sup>119</sup> The need to 'institutionalize' the process of dialogue, even informally, was also emphasized after the 1992 Ghana elections.<sup>120</sup>

Poland's 1991 election law makes particularly detailed provision for election commissions, at the national, constituency and polling district level.<sup>121</sup> The National Election Commission is described as 'a permanent organ vested with the authority to deal with preparation, organization and conduct of the elections'.<sup>122</sup> It is composed of three judges each of the Supreme Court, the Constitutional Tribunal and the High Administrative Court, recommended respectively by the President of each Court and appointed by the President of the Republic of Poland.<sup>123</sup> A National Election Office is also established, among other things, to provide secretariat services and advice to the National Election Commission.<sup>124</sup> No person who is a member of a commission may stand as a candidate, act as a party agent or poll watcher, or engage in political canvassing.<sup>125</sup>

The National Election Commission's duties, to be performed directly or by supervision over the lower echelons, include supervising observance of the election law; organizing the preparation and conduct of elections; appointing constituency election commissions; examining complaints against constituency election commissions; registering national lists of candidates; compiling and supervising the updating of voter registries; keeping constituency delimitation

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Electoral Commissions should not only be independent, but should be perceived as such. In Malaysia, the Group recommended that the Electoral Commission should report both to Government and to Parliament: Commonwealth Secretariat, *General Elections in Malaysia, 20-21 October 1990*. Report of the Commonwealth Observer Group, n.d., 4 (hereafter Commonwealth Observer Group, *Malaysia 1990*); also Commonwealth Observer Group, *Kenya 1992*, 10-11. It has been suggested that partiality in the election machinery can be compensated by the presence of international observers, if they are allowed: Freely Elected Heads, *Electoral Reform in Mexico*, 32.

<sup>118</sup> Freely Elected Heads, *Electoral Reform in Mexico*, 32.

<sup>119</sup> Commonwealth Observer Group, *Kenya 1992*, vii, 9-10.

<sup>120</sup> Commonwealth Observer Group, *Ghana 1992*, 62-3. Reference was made to the Election Council established for the 1980 independence elections in Zimbabwe: 'This served not only as a forum in which parties could air grievances but also as a useful gathering in which those responsible for the election could consult with parties and inform them of recent developments. It had no executive role and its usefulness lay in its function as a sounding-board.'

<sup>121</sup> Act of 28 June 1991 on election to the *Sejm* of the Republic of Poland, Ch. 6, Election Commissions, art. 44.

<sup>122</sup> *Ibid.*, art. 48.

<sup>123</sup> *Ibid.*, art. 53. Constituency election commissions are also composed of judges (art. 57), while polling district commissions are appointed by the municipal council from among voters, taking account of proposals by electoral committees (art. 61).

<sup>124</sup> *Ibid.*, art. 55.

<sup>125</sup> *Ibid.*, art. 45.

under review; establishing forms and standards for ballot paper and other official documents; establishing and publishing the definitive results of elections; certifying those who are elected; and reporting to the *Sejm* on the conduct of elections.<sup>126</sup>

The value of independent election commissions is evident in the reports of a succession of observation missions, such as those of the Commonwealth Observer Groups cited above, even as individual commissions failed to fulfil their promise. The Central Election Commission of Mongolia, for example, seems to have exercised too little authority in the June 1992 elections, in contrast to the District Electoral Commissions. The membership of the latter caused concern, however, since nearly every Chair and Secretary was a member of the ruling party. Given the many and various responsibilities, the opportunities for fraud and unspoken voter intimidation were considerable. The IFES made a number of recommendations designed to enhance the independence and credibility of the Commissions.<sup>127</sup>

In its 1992 pre-election evaluation of Togo, IFES recommended the creation of an objective, non-partisan national electoral commission, given the history of one-party rule.<sup>128</sup> The National Democratic Institute's review of the 1992 election in Cameroon doubted the value of ministerial administration of elections, particularly where every 'divisional and senior divisional officer had to be personally approved by the president, who was, of course, contesting the election.'<sup>129</sup> An observer mission to the Dominican Republic in 1990 found the political parties also distrusting the Central Electoral Board.<sup>130</sup> Similar, though anticipatory concerns, were expressed in NDI's assessment of the Senegalese electoral code in 1991. It recommended greater participation by opposition parties in monitoring the administration of national elections.<sup>131</sup> This was generally accepted, although at the 1993 Presidential elections the National Vote Tabulation Commission, which included a representative designated by each party, was unable to accomplish its task because of partisan divisions among its members.<sup>132</sup>

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<sup>126</sup> Ibid., art. 49; see art. 56 for the duties of the constituency election commission, and art. 60 for the duties of the polling district election commission. Compare the responsibilities of the Interim National Electoral Commission in the 1992 Ghana elections: Commonwealth Observer Group, *Ghana 1992*, 6.

<sup>127</sup> Brick, Gastil & Kimberling, *Mongolia 1992*, 13-14.

<sup>128</sup> Brunet, Marchand & Neher, *Togo 1992*, 37.

<sup>129</sup> National Democratic Institute for International Affairs. *An Assessment of the October 11, 1992 Election in Cameroon*. Washington, D.C., (1993), 18-20, 52, 54 (hereafter NDI, *Cameroon 1992*)

<sup>130</sup> Council of Freely Elected Heads of Government. National Democratic Institute for International Affairs. *1990 Elections in the Dominican Republic: Report of an Observer Delegation*. Special Report #2, (1990), 20.

<sup>131</sup> National Democratic Institute for International Affairs. *An Assessment of the Senegalese Electoral Code*. International Delegation Report. Washington, D.C., (1991), 24-6, 44 (hereafter NDI, *Senegal 1991*)

<sup>132</sup> National Democratic Institute for International Affairs. 'Executive Summary. February 21, 1993 Presidential Elections in Senegal.' International Delegation Report. Washington, D.C. (1993).

IFES also expressed concern in 1992 at the absence of any permanent Central Election Commission or Central Election Bureau in Romania, which in turn resulted in the lack of guidelines and adequate training for election officials.<sup>133</sup> A report on the 1990 elections noted the 'passive stance' of local electoral commissions, most of which were headed by former Communist party election organizers. In many locations the integrity of the electoral process was severely compromised, both by the absence of opposition party representatives at polling sites and by active intimidation.<sup>134</sup> Considerable improvements were noted at the time of the 1992 elections, however.<sup>135</sup>

The positive role to be played by electoral commissions in difficult or transition situations was reported in respect to the 1990 elections in Bulgaria,<sup>136</sup> the 1991 parliamentary elections in Bangladesh,<sup>137</sup> and (after a shaky start) the 1992 presidential election in Ghana.<sup>138</sup> The generally receptive governmental response to UN recommendations for an independent referendum commission in Malawi in 1993 also contributed to the overall success of the vote.<sup>139</sup>

'The consolidation of democracy requires that the institution that manages the electoral process be independent, competent, and perceived as completely fair by all the candidates and parties participating in the process.'<sup>140</sup>

These objectives may not be established all at once, however, in which case experience shows that confidence in an emergent multi-party system is only likely if the parties themselves are co-opted into the process of election management. The practices described above illustrate the alternatives, which derive not so much from legal obligation, as from good management sense.

<sup>133</sup> Atwood, S.J., Villaveces, M.M., *IFES Technical Election Assistance Project, Romania, March 10-September 29, 1992. Report*. International Foundation for Election Systems. Washington, D.C., (1992). See also National Democratic Institute for International Affairs. *The October 1990 Elections in Pakistan*. Report of the International Delegation. Washington, D.C., (1991), 28-9, 54-5, 112-3 (hereafter NDI, *Pakistan 1990*).

<sup>134</sup> US Commission on Security and Cooperation in Europe. *Elections in Central and Eastern Europe*. A Compendium of Reports on the Elections Held from March through June 1990. Washington, D.C., (Jul. 1990), 95, 97, 109, 112-3.

<sup>135</sup> Atwood, S.J., Villaveces, M.M., *IFES Technical Election Assistance Project, Romania, March 10-September 29, 1992. Report*, 15.

<sup>136</sup> National Democratic Institute for International Affairs. National Republican Institute for International Affairs. *The June 1990 Elections in Bulgaria*. International Delegation Report. Washington, D.C., (1990), 24 (hereafter NDI/NRI, *Bulgaria 1990*).

<sup>137</sup> Above, text to note 108.

<sup>138</sup> Commonwealth Observer Group, *Ghana 1992*, 40-2.

<sup>139</sup> *Report of the Joint International Observer Group on the Malawi National Referendum*, 14 Jun. 1993 (hereafter JIOG, *Malawi 1993*). Both the Nov. 1992 preliminary mission and the UN Centre for Human Rights report in Jan. 1993 recommended a commission independent of the government; additional opposition members were appointed by the government.

<sup>140</sup> Council of Freely Elected Heads of Government. National Democratic Institute for International Affairs. *1990 Elections in the Dominican Republic: Report of an Observer Delegation*. Special Report #2, (1990), 20.

The centrality of impartial and trustworthy election machinery is often taken for granted in established democracies. Few go so far as Costa Rica, for example, which has established its election commission as the 'Fourth Branch' of government, with funding and terms of membership guaranteed by the constitution. Whether explicitly or implicitly endorsed, independent and impartial election management is nevertheless essential in the transition to and consolidation of representative democracy.

### 3.1.4 *The right to vote*

Formal constitutional or statutory recognition of the citizen's right to vote is common to most States and plays both a substantive and a confidence-building role; a few countries make voting compulsory.<sup>141</sup> The right to vote is not absolute, however, and may be subject to reasonable restrictions which 'are not arbitrary and do not interfere with the free expression of the people's opinion'.<sup>142</sup> With respect to parliamentary elections, most States lay down citizenship, age and residency requirements. In its recent world-wide comparative survey, the IPU noted that 18 years is currently the voting age norm, adopted by some 109 States of the 150 surveyed.<sup>143</sup> A residency requirement has been upheld by the European Commission on Human Rights, for a number of reasons: the assumption that a non-resident citizen is less directly involved or knowledgeable; the impracticability for candidates to present electoral issues to citizens abroad; the need to prevent electoral fraud, the risk of which is increased by postal voting; and finally, the link between representation and the obligation to pay taxes.<sup>144</sup> In practice, however, there is a growing tendency to *broaden* the franchise, for example, by including overseas residents. A 1990 amendment to Austria's electoral law provides that every citizen living abroad may vote, whether he or she has a residence in the country or not.<sup>145</sup> The concept of citizenship is also expanding at regional level;

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<sup>141</sup> A cursory review of secondary sources for the last four years found only 16 countries with compulsory voting at one or other level: France (by the Electoral College for the Senate only); Nauru; Peru (until age 70); Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 27, 1992-1993, 85, 163, 177; Argentina; Belgium; Ecuador; Italy; Philippines; Singapore; Turkey: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 26, 1991-1992, 37, 41, 67, 91, 113, 123, 145, 165; Egypt (compulsory for men): Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 25, 1990-1991, 65; Australia; Costa Rica; Democratic People's Republic of Korea; Dominican Republic; Greece (for those under 70): Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 24, 1989-1990, 29, 53, 61, 67, 81.

<sup>142</sup> Sieghart, *Human Rights*, 363.

<sup>143</sup> IPU, *Electoral Systems*, 4, Art. 1 of the 1989 United Nations Convention on the Rights of the Child defines a child to mean 'every human being below the age of 18 years unless, under the law applicable to the child, majority is attained earlier'. See also art. 1, 1990 African Charter on the Rights and Welfare of the Child, to similar effect.

<sup>144</sup> Application 7566/76, 9 *Decisions and Reports* 121; cited in Sieghart, *Human Rights*, 363.

<sup>145</sup> Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 25, 1990-1991, 33.

the Maastricht Treaty, for example, establishes both a ‘citizenship’ of the European Union, and the right to vote and to stand for election to municipal bodies in the Member State where such citizen resides, on the same terms as local citizens.<sup>146</sup> To similar effect, the Council of Europe’s 1992 Convention on the Participation of Foreigners in Public Life at Local Level also aims to extend the right to vote and to stand in local authority elections to foreign residents.<sup>147</sup>

The rule of law requires that the classes of those disqualified from voting, if any, be known in advance, and that challenge be available in appropriate cases. Section 3 of the Canadian *Charter of Rights and Freedoms*, for example, guarantees all citizens the right to vote, while section 15 establishes equality before the law. The *Canada Elections Act* excludes certain categories, but the courts have declared that federally-appointed judges and the mentally handicapped are constitutionally entitled to vote. In a 1993 judgment the Supreme Court of Canada also ruled that the statutory exclusion of prison inmates was drawn too broadly and failed to meet the proportionality test.<sup>148</sup> On the other hand, in another 1993 decision, the Supreme Court ruled that the *Charter* does not guarantee Canadians a constitutional right to vote in a *referendum*, ‘basically a consultative process’, as opposed to elections of representatives of the federal and provincial legislative assemblies.<sup>149</sup> Those who, by reason of residence requirements, were unable to vote in a referendum, were beyond the scope of the constitutionally protected equality provision.<sup>150</sup>

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<sup>146</sup> See Maastricht Treaty, Title I, Article F; Part Two (Citizenship of the Union), Articles 8, 8b. The European citizen is also entitled to vote and stand as candidate for the European Parliament in his or her Member State country of residence: art. 8b(2).

<sup>147</sup> Council of Europe, 1992 Convention on the Participation of Foreigners in Public Life at Local Level: ETS No. 144, art. 6. Freedom of expression, peaceful assembly and association are also protected: art. 3. As the former carries with it ‘duties and responsibilities, it may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary’: art. 9(2). The freedoms of peaceful assembly and association may also be restricted, though to a lesser degree: art. 9(3).

<sup>148</sup> *Sauvé v. Canada (Attorney General)* [1993] 2 SCR 438.

<sup>149</sup> The European Commission on Human Rights reached a similar conclusion with respect to the United Kingdom’s referendum on European Community membership: Application 7096/75: 3 *Decisions and Reports* 165; cited in Sieghart, *Human Rights*, 365; Goy, ‘La garantie européenne du droit à de libres élections législatives’ 1290-7.

<sup>150</sup> Cf. the interpretation of art. 3, Protocol 1, European Convention on Human Rights, in Application 1065/61: above, note 34. Also, Schweizer, R., ‘Zur Stellung der Schweiz gegenüber Art. 3 des Zusatzprotokolls zur Europäischen Menschenrechtskonvention (Gewährleistung von freien und geheimen Wahlen),’ 41, 43-4.

Other countries likewise maintain residency requirements as a basic condition of entitlement to vote,<sup>151</sup> but tend to be equally or more restrictive with respect to those suffering from mental disability or convicted of criminal offences.<sup>152</sup> Some countries also disqualify military personnel from voting, a practice particularly common in Latin America.<sup>153</sup> Such limitations, provided they have a rational basis, remain proportional and are not used as a device to disenfranchise significant sections of the population, arguably fall within the margin of appreciation left to States. Discriminatory disenfranchisement, however, would violate general principles of international law.

The United Nations Human Rights Committee (HRC) has considered the principles of equality and non-discrimination in relation to access to public service under article 25 of the 1966 Covenant on Civil and Political Rights. In *Silva and Others v. Uruguay*, the applicants claimed violation of their article 25 rights, so far as they had been deprived by law of the right to engage in political activity, including the right to vote, for fifteen years, because they had previously stood as candidates for certain political groups which had subsequently been declared illegal. Although the Government argued that it had derogated from the relevant articles, it provided inadequate information on the existence of any emergency. The HRC found no justification for such a blanket denial of rights. In the absence of necessity, the principle of proportionality indicated a breach of article 25, and Uruguay was under an

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<sup>151</sup> Cf. art. 50, Constitution of the Kingdom of Norway 1814, as amended 10 June 1988: the extent to which those resident abroad or suffering from a seriously weakened mental state may be entitled to vote shall be determined by law; art. 6, Act of 28 June 1991 on election to the *Sejm* of the Republic of Poland: citizens aged 18 may vote, as may those whose Polish citizenship has not been ascertained, who are not citizens of another country, and have been resident for five years. Citizenship, age 18 and residence were common requirements for voting in the 1990 elections in various East European countries, including the German Democratic Republic, Slovenia, Croatia, and Romania; Czechoslovakia and Bulgaria both allowed non-resident citizens to return to vote. See US Commission, *Central and Eastern Europe 1990*, at 14, 65, 79, 107, 127, 153. Exclusions on mental health grounds were common to the electoral laws of the same countries. See also Senegal (citizenship, age 21 and 6 months residency, though with provision for registration of citizens residing overseas): NDI, *Senegal 1991*, 12; Pakistan (citizenship, age 21, 'deemed' to be a resident of the electoral district): NDI, *Pakistan 1990*, 32.

<sup>152</sup> Cf. art. 53, Constitution of the Kingdom of Norway 1814, as amended 10 June 1988: the right to vote is lost by persons sentenced for criminal offences; also art. 7, Act of 28 June 1991 on election to the *Sejm* of the Republic of Poland. Those serving prison sentences were excluded in the German Democratic Republic, Hungary, and Bulgaria; Czechoslovakia allowed prisoners to vote in the locality where they were incarcerated. See US Commission, *Central and Eastern Europe 1990*, at 14, 127, 147. See also Senegal (exclusion of those convicted): NDI, *Senegal 1991*, 12; Cameroon (exclusion of those convicted of felony): NDI, *Cameroon 1992*, 21. Restrictions on prisoners' right to vote have been upheld by the European Commission on Human Rights; see Applications 2728/66: 25 *Collection of Decisions* 38; 4984/71: 43 *Collection of Decisions* 28.

<sup>153</sup> Countries denying the vote to military personnel include Brazil (below the rank of sergeant), Colombia, Dominican Republic, Ecuador, Guatemala, Honduras, Paraguay, Peru, Uruguay (below the rank of corporal), Venezuela, Chad, Kuwait, Senegal and Tunisia. Indonesia is a special case, for although military personnel are barred from voting, 100 of the 500 seats in the House of Representatives are reserved for retired or active members of the armed forces, appointed by the President of the Republic.



obligation to enable the applicants once again to participate in political life.<sup>154</sup>

In resolution 46/137, the UN General Assembly reaffirmed that,

‘the systematic denial or abridgement of the right to vote on grounds of race or colour is a gross violation of human rights and an affront to the conscience and dignity of mankind, and...the right to participate in a political system based on common and equal citizenship and universal franchise is essential for the exercise of the principle of periodic and genuine elections.’

The principle of non-discrimination today goes beyond race, to include religion, sex, social group, political opinion or other irrelevant consideration. An electoral system which denied the vote to minority populations, or which disenfranchised half the citizenry, for example, by excluding women,<sup>155</sup> would be incompatible with international standards, and incapable of reflecting the ‘will of the people’.

In a society of nation States that defines its members, inter alia, by reference to a population presumed subject to the territorial sovereign, the basic criterion for participation in national political life is clearly citizenship. The international legal principles of non-discrimination and proportionality<sup>156</sup> significantly limit the freedom of States to condition the right to vote, as is evidenced by the small range of permissible restrictions illustrated above. From recognition of the individual right to vote flows the necessity of voter registration machinery, without which, in the majority of cases, there can be no effective exercise of that right.

### 3.1.5 *Voter registration*

Giving practical effect to the right of those eligible to vote raises more serious problems. Formally recognizing the right to vote is only part of the issue, for substantial opportunities exist to frustrate the exercise of that right, for example, by obstructing access to the necessary documentation, or otherwise interfering with or discouraging registration. In El Salvador, for example, voter registration was all the more difficult because of the destruction of registries during the civil war, with resulting loss of records. Coupled with significant internal displacement, this made the task of obtaining substitute documentation even harder.

<sup>154</sup> Human Rights Committee, Annual Report 1981: UN doc. A/36/40, p. 153. See also *Massera v Uruguay*: Human Rights Committee, Annual Report 1979: UN doc. A/34/40, p. 124, cited in Sieghart, *Human Rights*, 365. In Application 6573/74: 1 *Decisions and Reports* 87, the European Commission of Human Rights upheld a Dutch law depriving persons convicted of ‘uncitizenlike’ behaviour during the Second World War of their right to vote for life. Cited in Sieghart, *Human Rights*, 363.

<sup>155</sup> Only male citizens over 21 are entitled to vote in Kuwait: IPU, *Chronicle of Parliamentary Elections and Developments*, No. 24, 1989-1990, 109; the right to vote was extended to women in 2005. In Egypt, male electors are registered automatically and women on request; voting is compulsory only for men: *ibid.*, No. 25, 1990-1991, 65-6. For recent developments, see above, Part 1, *Free and Fair Elections: Further Steps along the Democracy Road*, section 3.5.

<sup>156</sup> Considered in the sense described above in note 74.



The 'electoral list' is thus a crucial feature in the organization of free and fair elections. Such a system, suggests a recent commentator, must be designed to enable all qualified citizens to be included, to prevent electoral abuse and fraud by individuals, special interest groups, political parties and governments; and be 'widely accepted as an authoritative and legitimate means of cataloguing the electoral population and of settling disputes'.<sup>157</sup> As the Commonwealth Observer Group to the 1992 presidential elections in Ghana put it:

'An electoral roll of acceptable completeness and accuracy lies at the heart of the democratic process where the ability to vote depends on whether a voter's name is on the roll. It is also the centre-piece of any meaningful door-to-door campaigning and is fundamental to the discharge by party polling agents of their duties on polling day.'<sup>158</sup>

Accuracy is important, especially so in proportional representation systems that employ multi-member constituencies, but how to ensure a credible registration system is no simple matter. Few countries will be able, like Denmark, to update their voting registers continuously and automatically, as information is supplied by local authorities.<sup>159</sup> On occasion, 'self-registration' may be enough,<sup>160</sup> but positive governmental action will often be essential in situations of transition. In the United Kingdom, annual registers are compiled through forms sent to every household requiring all those living there and eligible to vote to be listed; house visits are also undertaken (and in Canada visits by 'enumerators' are the rule). Provisional lists are drawn up and published, subject to objections; these are decided by the electoral registration officer, from whom appeal lies to the county court. The final list is then deposited in public libraries and some other public buildings.<sup>161</sup> Experience shows that involving political parties and special interest groups in promoting, monitoring and auditing the registration process is often called for, together with extensive civic education programmes, including training election officials,

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<sup>157</sup> Courtney, John C., 'Introduction,' in Courtney, John C., ed., *Registering Voters: Comparative Perspectives*, The Center for International Affairs. Harvard University, (1991), at 1-2. The first multi-party elections in the Comoros in Nov. 1992, for example, were marred by the government's refusal to update voting lists: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 27, 1992-1993, 63-5.

<sup>158</sup> Commonwealth Observer Group, *Ghana 1992*, 17.

<sup>159</sup> ECPRD, *Electoral System Legislation*, 53-4.

<sup>160</sup> Whether self-registration promotes voter turn-out is another matter; see Wolfinger, Raymond E., 'The Politics of Voter Registration Reform,' in Courtney, John C., ed., *Registering Voters: Comparative Perspectives*, The Center for International Affairs. Harvard University, (1991), 28.

<sup>161</sup> *Ibid.*, 471.

and getting the voting message across to the public,<sup>162</sup> for example, on how and where to register, and the rights and responsibilities of living in a democracy.<sup>163</sup>

At a practical level, the process of voter registration requires clear eligibility criteria<sup>164</sup> and their consistent application by trained officials. Depending on the method used, whether voluntary registration or official enumeration, those eligible should be aware of the procedure. Electoral lists should be published promptly, and clear effective means should be available for correcting errors, including omissions and cancellation of those deceased or who have moved.<sup>165</sup> The Joint International Observer Group which covered the Malawi national referendum in June 1993 found that voters generally were aware of what to do, as a result of radio announcements and campaign activities by special interest groups, churches, and at public events. The Malawi Referendum Commission also had the specific duty to *promote* registration and civic education, and inconsistent application of policy was most usually due to lack of training.<sup>166</sup>

Many recent elections have been criticised precisely because deficiencies in voter registration, other than minor omissions, have cast doubt on their fairness.<sup>167</sup> A 1992 report by IFES on the registration system in Ghana cited a variety of technical irregularities with the roll, including an apparently

<sup>162</sup> The June 1990 elections in Czechoslovakia were preceded by a concerted 'get out the vote campaign'; as one Prague poster put it, 'Everyone who doesn't vote, votes for totalitarianism.' Approximately 95 per cent of eligible voters participated: US Commission, *Central and Eastern Europe 1990*, 126, 132.

<sup>163</sup> Jeffrey Fischer, 'Voter Registration in Emerging Democracies. Two Case Studies: Haiti 1990; Guyana 1991,' in Courtney, John C., ed. *Registering Voters: Comparative Perspectives*. The Center for International Affairs. Harvard University, (1991), 55.

<sup>164</sup> See Brick, Gastil & Kimberling, *Mongolia 1992*, 18, noting that it was unclear how voter lists were prepared, and recommending a nation-wide computerized civil registry from which the Central Election Commission could generate voter lists.

<sup>165</sup> See Atwood, Susan J., Villaveces, Marta Maria. *IFES Technical Election Assistance Project, Romania, March 10-September 29, 1992. Report*. International Foundation for Election Systems. Washington, D.C. (1992), 14f, recommending advance publication of the voter registry and that both 'election officials and the political parties must take the responsibility for alerting voters to the need to check these lists'. See also Brunet, Marchand & Neher, *Togo 1992*, 24.

<sup>166</sup> JIOG, *Malawi 1993*: 'Rigorous application of the age criteria was unprecedented and at times problematic; local teachers acting as clerks were helpful ... Registration clerks often relied on their personal knowledge of applicants, advice of domestic monitor and testimonials...' (para. 55). Some minor instances of intimidation due to the presence of government party monitors were noted, but otherwise the presence of monitors in the process contributed to a high degree of credibility.

<sup>167</sup> See National Democratic Institute for International Affairs. 'Executive Summary. February 21, 1993 Presidential Elections in Senegal.' International Delegation Report. Washington, D.C. (1993): errors on electoral lists, electoral cards and national identity cards, coupled with the issue of duplicate electoral cards, tended to disfavour opposition candidates, while the distribution of blank 'ordinances' designed to allow errors of omission to be corrected tended to compromise confidence in the system. National Democratic Institute for International Affairs. 'Preliminary Statement. NDI International Observer Delegation to the Pakistan National Elections,' 8 Oct. 1993: the quality of the electoral rolls was often in doubt, leading to problems in identifying and verifying voters. In both cases, the observer missions did not consider such irregularities sufficient to question the election results overall. See also Commonwealth Observer Group, *Kenya 1992*, 12-14.

larger-than-statistically-possible number of registered voters, failure to purge those who had died since 1987, double entries resulting from software problems, and inconsistent registration of names.<sup>168</sup> The Commonwealth Observer Group was somewhat more sanguine in its assessment, however, noting that voters' rolls in developing countries tend to have deficiencies of one kind or another. What counts is whether this results from manipulation or muddle, and the potential to affect the outcome of an election,<sup>169</sup> it is not so much the question of errors themselves, as the 'bias' of the list in a particular direction. The Commonwealth Group agreed with IFES that the errors resulted from misinformation rather than a deliberate attempt to affect the results, but criticised IFES's offhand dismissal of the roll and its 'imperative' call for re-registration. Less expensive alternatives had not been considered, and the criticism had merely served to heighten controversy.<sup>170</sup> Even if the number of errors and duplications is high in any particular case, there may be other practical means to prevent double or multiple voting, for example, by marking voters with indelible ink,<sup>171</sup> or by the use of 'tendered votes'.<sup>172</sup> The Group cited experience with the independence vote in Zimbabwe, conducted without a formal voters roll:

'...provided the voters' roll is inclusive rather than exclusive (i.e. that it has not been corrupted by the systematic exclusion of particular voters) and provided it affords the electorate at large a reasonable opportunity to vote, it need not be a barrier to a free and fair election provided always that the voters' ink is dependable.'

The *security* of the voter registration system is thus as important as its integrity.<sup>173</sup>

Voter registration and the publication of verifiable lists of electors have an important part to play in building and maintaining the confidence of the electorate, and thereby contributing also to ensuring free and fair elections. Given the inherent opportunities for disenfranchising substantial portions of the population through manipulation of the registration process, transparency

<sup>168</sup> IFES Report of 1 June 1992, 17, cited in Commonwealth Observer Group, *Ghana 1992*, 11-12.

<sup>169</sup> Commonwealth Observer Group, *Ghana 1992*, 12.

<sup>170</sup> The Commonwealth Observer Group noted that re-registration would have cost some \$14.5 million, to which IFES proposed a US contribution of \$200,000: *ibid.*, 14-15; see also the Group's conclusions at 63-5.

<sup>171</sup> *Ibid.*, 16. Sometimes the ink turns out to be less than indelible, as happened in Nicaragua in 1990. In the absence of other problems indicating multiple voting, the parties agreed to accept the outcome of the election: Freely Elected Heads, *Nicaragua 1990*, 24.

<sup>172</sup> On the use of 'tendered votes' in Cambodia, see IPU, *Report of IPU Election Observer Mission, Cambodia, 16 May-4 June 1993*, 12-13.

<sup>173</sup> As one commentator puts it, 'The right to vote...must be accompanied by the right to have one's vote counted without being diluted by votes fraudulently cast.' Kimberling, William C., 'A Rational Approach to Evaluating Alternative Voter Registration Systems and Procedures,' in Courtney, John C., ed. *Registering Voters: Comparative Perspectives*. The Center for International Affairs. Harvard University, (1991), 3.

of process is called for. Political parties have a fundamental role in getting their supporters to register, double-checking provisional lists, and challenging errors. Practice varies between the State responsibility model of registration, through household surveys and visits, and the self-registration model, where the initiative lies with the voter. No rule determines the choice, but circumstances may dictate a pro-active role for the State, for example, in transition situations where both the idea of voting and the possibility of a free choice may be novel experiences. Only if the population at large is aware of the procedures and effectively able to access them, will a resulting election likely be fair.

### 3.1.6 *Civic education and voter information*

Civic education and voter information, like other topics mentioned here, might at first seem to fall outside the strict purview of State responsibilities with respect to free and fair elections; in fact, civic education is part of the school curriculum in most established democracies. The Commonwealth Observer Group to the 1991 elections in Zambia considered that ‘an intensive and widespread voter education programme about the rights, processes and implications’ of the change to a multi-party system was to have been expected. It expressed its disappointment with the apparently limited impact of what had been done, and at the failure of the media in particular to contribute to the education of voters.<sup>174</sup> Experience in Ghana in 1992 provided a marked contrast. Posters were widely displayed, with instructions on how to vote, encouraging exercise of the franchise and promoting democratic ideals of tolerance and peaceful political activity. With financial support from foreign government and non-government agencies, education posters, radio and television programmes and booklets were produced and widely distributed, targeting not just voters, but also candidates and political parties;<sup>175</sup> the Commonwealth Observer Group concluded that, ‘Across the country, the average voter seemed to be extremely well-informed about the date of the poll, the hours of voting and the procedures to be followed.’<sup>176</sup>

Most observers also agree that UNTAC’s education programme in Cambodia was extraordinarily successful, both in terms of resources and effects.<sup>177</sup> As another international delegation report put it recently,

‘...democracy can be defined in very formal terms: fair elections; a free press; and multiple parties. However, to establish a pluralist system

<sup>174</sup> Commonwealth Secretariat, *Presidential and National Assembly Elections in Zambia, 31 October 1991*, Report of the Commonwealth Observer Group, (1992), 12 (hereafter Commonwealth Observer Group, *Zambia 1991*).

<sup>175</sup> Commonwealth Observer Group, *Ghana 1992*, 26-8; Annexes VII-IX.

<sup>176</sup> *Ibid.*, 65.

<sup>177</sup> See generally, IPU, *Report of IPU Election Observer Mission, Cambodia, 16 May-4 June 1993*.

requires more...An environment must exist in which the values of democracy are understood and acted upon by the population...Such an environment is not something that simply emerges. It is a consequence of actions by people in leadership positions. The government can play an important role in stimulating activity...through non-partisan civic education programs that promote democratic values among the adult population and that form an essential part of the general education curriculum. Political parties, civic organizations and the media have an important role to play in this connection.<sup>178</sup>

Again, the principle of effectiveness of obligations, supported by the actual practice of States in situations marked by deficiencies in this field,<sup>179</sup> such as lack of experience with voting in a democratic environment with 'real' choices, shows how both civic education and voter information can be central in attaining the objective of a free and fair election. Election observation missions have repeatedly stressed the necessity for civic education, voter information and poll worker training,<sup>180</sup> confirming the necessity for active programmes in situations of transition or change if the result is to be truly representative of the will of the people. As with voter registration, a passive government policy, leaving education to political parties, churches and NGOs, may not be sufficient to establish the basic conditions for the conduct of a free and fair election.

### 3.1.7 *Candidates, political parties and political organization*

By contrast with some of the other indices of free and fair elections, candidates, political parties and political organization fall more easily within traditional notions of human rights. Article 25 of the Covenant on Civil and Political Rights, for example, provides that every citizen has the right, without discrimination, to take part in the conduct of public affairs, to be elected, and to have equal access to public service in his or her country. Those rights are not absolute, however, and may be subject to a variety of reasonable limitations. A State's choice of electoral system, for example, may directly affect the freedom of individuals to present themselves as candidates for election,

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<sup>178</sup> NDI, *Senegal 1991*, 38.

<sup>179</sup> Brunet, Marchand & Neher, *Togo 1992*, at 1, recommending a vigorous programme of civic education particularly since most Togolese had never experienced either free elections or democracy.

<sup>180</sup> In addition to the examples cited above, see National Democratic Institute for International Affairs. 'Executive Summary. February 21, 1993 Presidential Elections in Senegal.' International Delegation Report. Washington, D.C. 1993; National Democratic Institute for International Affairs. Council of Freely Elected Heads of Government. 'Preliminary Post-Election Statement. International Delegation to the National Elections in Paraguay.' 10 May 1993. Asunción, Paraguay. Note also the work of civic organizations and the Central Election Commission in Bulgaria: NDI/NRI, *Bulgaria 1990*, 26-7, 31-2.

otherwise than through a recognized political party. ‘Threshold’ requirements can also limit the representation possibilities for parties that fail to obtain a certain percentage of the vote.<sup>181</sup> Registration criteria may effectively prevent the formation of political parties, while State monopolies over certain resources, such as funding, meeting places, transport, printing presses and the media may hinder even minimal political organization. Some of the limitations on individual candidatures are mentioned above, and other restrictions are dealt with below in the context of electoral campaigns. The CSCE standard, for example, emphasizes the necessity for *choice*, by requiring a clear separation between State and political parties, and in particular that political parties not be merged with the State.<sup>182</sup>

Within the European context, article 3 of the First Protocol has come to be interpreted as guaranteeing freedom of choice, which in turn implies freedom to present oneself for election, as well as freedom of political organization.<sup>183</sup> The European Commission on Human Rights has held that the banning of political parties violated article 3. Parties must have reasonable opportunities to present their candidates for election, but may nonetheless be subject to certain conditions affecting, for example, registration and funding.<sup>184</sup> Looking at the ‘general conditions’ of the electoral process, the Inter-American Commission on Human Rights has deduced the requirement that the different political groups must be allowed to participate under equal circumstances; they should ‘all have similar basic conditions for conducting their campaign’.<sup>185</sup> It criticised the Sandinistas in its 1983-84 Annual Report for having used all the resources of the State to put itself at an advantage.<sup>186</sup> Similar criticism was levelled at Chile with respect to the 1978 referendum and the 1980 plebiscite.<sup>187</sup>

Commonwealth observer groups have also repeatedly called for ‘de-linking the ruling party from the government.’ As one Group put it,

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<sup>181</sup> See above, section 3.1.1. The 5 per cent threshold in the December 1993 Russian election appears to have been intended especially to keep out small, ‘troublesome’ parties: US Commission, *Russia 1993*, 4.

<sup>182</sup> CSCE: Declaration of the Copenhagen Meeting: 29 I.L.M. 1305 (1990), para. (5.4). Lack of choice generally will be sufficient to prejudice the outcome of an election; a French parliamentary delegation to a recent presidential election in an African State, boycotted by the two principal opposition candidates, concluded that the elections ‘n’avaient pas eu lieu dans des conditions satisfaisantes en raison du caractère non contradictoire de ce scrutin, et que leur déroulement posait plus de questions qu’il n’apportait de réponses’. *Bulletin de l’Assemblée Nationale*, no. 14 du 5 oct. 1993, 61-2.

<sup>183</sup> Goy, ‘La garantie européenne du droit à de libres élections législatives’ 1301-2.

<sup>184</sup> A provision requiring would-be registered parties to obtain a certain number of signatures (between one and five hundred) as a pre-condition to acceptance was upheld as reasonable: Goy, ‘La garantie européenne du droit à de libres élections législatives’ 1302, although in the December 1993 Russian elections fairly onerous signature requirements (100,000) were identified as a source of problems: US Commission, *Russia 1993*, 8, 15.

<sup>185</sup> *Final Report on Cases 9768, 9780 and 9828*: IACmHR, 97, para. 49: OEA/Ser.L/V/II.77, doc. 7, rev. 1 (1990); text in Buergenthal, T. and Norris, R.E., *Human Rights: The Inter-American System*, Part 3, Cases and Decisions, Booklet 21.6, Release 93-1, p. 77, 89.

<sup>186</sup> *Ibid.*, para. 52.

<sup>187</sup> *Ibid.*, para. 54, citing its earlier reports.

‘Recent Commonwealth experience suggests that at the political level two elements are of particular importance to the conduct of free and fair elections during the transition from a one-party to a multi-party system: the creation of a ‘level playing field’ for the lawful activities of all political parties and a thorough de-linking of government affairs, personnel and resources from those of the ruling party.’<sup>188</sup>

In practice, such identification has proven difficult to unravel at the moment of transition, for example, in the 1992 elections in Kenya<sup>189</sup> and Ghana,<sup>190</sup> the 1991 Zambia elections,<sup>191</sup> or in the July 1992 Nigerian parliamentary elections. On the latter occasion, only two political parties were allowed to participate; both were created by the (military) administration, which also funded their organization and activities, and wrote their manifestos.<sup>192</sup> Once again, principles of reasonableness and proportionality show at which point such restrictions render elections unfair.

Article 25 of the 1966 Covenant on Civil and Political Rights confirms the entitlement of every citizen to take part in the conduct of public affairs, to vote and to be elected. State practice in turn confirms that this right is not absolute, but may be subject to reasonable limitations, and the *criteria for individual candidature* commonly follow those necessary for voting: minimum age, residence and absence of disqualification.<sup>193</sup> The rationale for certain conditions such as age or residence is obvious: a sufficient level of maturity and connection to the community.<sup>194</sup> Other limitations in turn may seek to protect the integrity of the system, for example, by excluding those whose independence

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<sup>188</sup> Commonwealth Observer Group, *Kenya 1992*, 7.

<sup>189</sup> *Ibid.*, vii: ‘The process of decoupling... was not undertaken with the degree of commitment necessary... and... the time within which that decoupling could have taken place was too short.’; see also at ix, 39.

<sup>190</sup> Commonwealth Observer Group, *Ghana 1992*, 63.

<sup>191</sup> Commonwealth Observer Group, *Zambia 1991*, 9-10; NDI/Carter Center, *Zambia 1991*, 43-4. See also Commonwealth Secretariat, *Referendum on the Draft Constitution in Seychelles, 12-15 November 1992*, Report of the Commonwealth Observer Group, (1992), 12 (hereafter Commonwealth Observer Group, *Seychelles November 1992*); with respect to the Democratic People’s Republic of Korea, see Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 24, 1989-1990, 61-2; and for Cuba, see *Keesing’s Record of World Events*, News Digest for February 1993.

<sup>192</sup> Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 27, 1992-1993, 169-71. Following the election, with a significantly low turnout, the new legislature was not allowed to start sitting after all, as the military regime argued that it would be unconstitutional before an elected President was sworn in. Presidential elections were duly held in June 1993, and subsequently annulled by the military.

<sup>193</sup> For a summary account of qualifications, see IPU, *Electoral Systems: A World-Wide Comparative Survey*, Geneva, (1993). The Romanian electoral law prohibited the participation of those ‘who have committed abuses in political, judicial and administrative functions, who have infringed upon fundamental human rights, as well as those people who have organized or who have been instruments of repression in the service of the security forces, the former police and militia forces.’ Carothers, T., ‘Romania,’ in Garber & Bjornlund, *New Democratic Frontier*, at 81, finds no evidence that it was ever applied.

<sup>194</sup> The European Commission on Human Rights upheld age limits of 25 (House of Representatives) and 40 (Senate) in Belgium: Application 6745-6/74 (*W, X, Y & Z v. Belgium*): 2 *Decisions and Reports* 110; cited in Sieghart, *Human Rights*, 363-4.



may be threatened by legislative responsibilities, such as judges and civil servants; or who may be tempted by the possibility for material benefits, such as public contractors.<sup>195</sup> European jurisprudence recognizes a variety of conditions and exclusions, including penal detention and residence requirements, but provides generally that they shall be prescribed by law and reasonably necessary in a democratic society. They must also not be arbitrary or violate the principle of non-discrimination.<sup>196</sup> The Inter-American Commission on Human Rights has interpreted the entitlement of the State to develop its internal life freely as nevertheless subject to the obligation to respect the rights of individuals, specifically as recognized in the American Convention on Human Rights.<sup>197</sup>

Substantive or ideological obstacles to participation, however, may well violate the individual right to participate in public affairs, particularly given the provisions of article 19 of the Covenant and the principle of non-discrimination. Candidates in Indonesia must be loyal to *Pancasila* as the basic ideology of the State; in Iran, unless of a recognized religious minority, they must have a belief in and active obligation to Islam and the prevailing system of government; in Portugal, they are disqualified if they held important public positions before 1 April 1974, and did not clearly repudiate the regime then in power before that date; in Iraq, they must uphold the principles and aims of the July 1968 revolution.<sup>198</sup> The prevailing jurisprudence on denial or restriction of political rights indicates that such measures will violate individual rights if unreasonable, arbitrary or disproportionate; while the State may be free, for example, to restrict the activities of those who previously abused a position of executive or legislative authority, to deny political rights merely on the basis of political opinion poses a direct challenge to the democratic process itself.

Other, technical requirements can also constitute obstacles to effective political participation. Entitlement to stand as a candidate, for example, often requires nomination by a political party,<sup>199</sup> although independent candidates may sometimes qualify in their own right.<sup>200</sup>

<sup>195</sup> The latter are expressly barred from being candidates for election in Costa Rica: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 24, 1989-1990, 53.

<sup>196</sup> Goy, 'La garantie européenne du droit à de libres élections législatives' 1316-24.

<sup>197</sup> *Final Report on Cases 9768, 9780 and 9828*: IACmHR, 97, paras. 94, 99-102. Above, note 185.

<sup>198</sup> See Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 26, 1991-1992, 79, 83, 133; *ibid.*, No. 23, 1988-1989, 49 (i.e. before the overthrow of Saddam Hussein).

<sup>199</sup> Cf. the Dominican Republic, in which candidates must be nominated by a political party recognized by the Central Electoral Board; independent candidates may only stand if they are backed by a political group that has an organization and a programme similar to that of a political party: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 24, 1989-1990, 67.

<sup>200</sup> In Bulgaria, for example, this required obtaining the signatures of 500 citizens: NDI/NRI, *Bulgaria 1990*, 30. Electoral law revisions in the Baltic States and the Soviet Republics in 1989 opened the way to broader-based candidacies. The 1989 Latvian Law on Elections to the Supreme Soviet laid down a minimum age of 21 for candidates, who must also have lived in Latvia for ten years. Previously, only the Communist Party, labour collectives and other public organizations had been permitted to nominate candidates; the new law extended to any public or political organization having at least one hundred members. See also US Commission on Security and Cooperation in Europe, *Elections in the Baltic States and Soviet Republics*, Washington, D.C., (1990), 62f, 100f, 126.

*Registration requirements for political parties* can operate both as formal and as substantive restrictions. The governing criterion will be how those requirements work in practice. Although the 1991 Senegalese electoral code contained no restrictions on parties, some opposition groups argued that the requirement for payment of a deposit for ballot printing, reimbursable only if the party obtained a certain percentage of the vote, was unfair to smaller parties with limited funding.<sup>201</sup> Though such a 'threshold' might serve the legitimate purpose of restricting truly marginal parties, the NDI assessment recommended that alternative methods be considered. Togo's 1991 law, the Political Parties' Charter, describes the duties of political parties, the regulations governing their creation, finances and penalties for contravention. A minimum of 30 persons is required to set up a political party, coming from two thirds of the prefectures in the country. Application is made to the Ministry of the Interior and, if everything is in order, the party must thereafter publish basic information about the organization in the official gazette and another journal. Approved parties may present candidates at elections.<sup>202</sup> In Mexico, a political party may be registered if it has at least 3,000 members in each one of at least half the States of Mexico or at least 300 members in each of at least half the single-member constituencies; in either case, the total number of members must be not less than 65,000.<sup>203</sup> The *Comprehensive Settlement Agreement* for Cambodia provided that political parties could be formed by any group of five thousand registered voters, but also required that party platforms be consistent with the principles and objectives of the Agreement. Party affiliation was required to stand for election to the constituent assembly, and UNTAC was made responsible for determining whether parties and candidates qualified for participation in the election.<sup>204</sup>

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<sup>201</sup> Financial deposits are a common requirement also for individual candidates, with forfeiture or reimbursement determined by the numbers of votes polled; in the United Kingdom, candidates lose their £500 deposit if they fail to poll at least 5 per cent of the vote.

<sup>202</sup> Brunet, Marchand & Neher, *Togo 1992*, 20. IFES recommended extending certain administrative deadlines and, in order to protect the process from political influence, that accreditation of political parties should be entrusted to an electoral commission.

<sup>203</sup> Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 26, 1991-1992, 113. Parties applying for registration in Ghana were required to list members in all regions of the country and to have offices in at least two-thirds of the districts in each region. Members of the party leadership were to be resident in separate districts, 'in order to ensure a truly national character': Commonwealth Observer Group, *Ghana 1992*, 6.

<sup>204</sup> *Comprehensive Settlement Agreement for Cambodia*, Elections Annex (Annex 3), arts. 5-7:31 *Int. Leg. Mat.* 180 (1992). Cf. David Hearst and Jonathan Steele, 'Russian parties barred from poll,' *The Guardian Weekly*, 21 Nov. 1993, p. 7: Russia's Electoral Commission barred eight political groupings — a third of the field — from putting up candidates in the elections for the new parliament, scheduled for 12 December 1993. It was claimed that the eight blocs had failed to achieve either the 100,000 signature threshold required under the law, or the requirement not to get more than 15 per cent of signatures from only one region. The Russian All People's Union claimed, however, that the police had confiscated 22,000 signatures on the day before the registration deadline. See also US Commission, *Russia 1993*, 8-9, 16.

From time to time governments ban particular political parties. The European Commission on Human Rights has ruled that the benefit of Protocol 1, article 3 of the European Convention cannot be claimed by those who would participate in elections for a purpose incompatible with article 17, namely, to destroy the very rights and freedoms protected.<sup>205</sup> Relying on the *travaux préparatoires*, the European Commission also rejected the complaint of the applicant in *German Communist Party v. Federal Republic of Germany* that it had been dissolved and its property confiscated contrary to articles 9, 10 and 11 of the Convention. The European Commission noted that the avowed aim of the party was to establish a communist society by means of a proletarian revolution and the ‘dictatorship of the proletariat’; this would entail the suppression of various rights and freedoms protected by the Convention.<sup>206</sup> During the 1990 elections, the Electoral Commission in the former German Democratic Republic banned the neo-nazi West German Republikaner Party or any local branch from running candidates, relying on the electoral law prohibition on parties or political associations that express hatred against denominations, races and peoples, or which engage in war propaganda. The ban provoked no controversy.

Bulgarian legislation permitted the banning of parties based on religious or ethnic principles, although none was so proscribed during the 1990 elections.<sup>207</sup> Ghanaian regulations prohibited the use of signs, symbols or slogans which identified groups with any particular region, ethnic origin, religion or profession.<sup>208</sup> The registration of the Islamic Party of Kenya was rejected in 1992, on the ground that it was ‘a religious group subject to foreign interests and ... because it was deemed to be a threat to national security.’<sup>209</sup>

*Funding* for political parties can raise difficult issues, particularly in situations of transition, for example, where the ruling party maintains a significant monopoly on public resources, or where external influence is feared.<sup>210</sup> In Nicaragua for the 1990 elections, the Supreme Electoral Council

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<sup>205</sup> *Glimmerveen and Hagenbeek v. Netherlands* (Applications 8348/78 and 8406/78): 18 *Decisions and Reports* 187; cited in Sieghart, *Human Rights*, 363. Art. 17 provides: ‘Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.’

<sup>206</sup> Application 250/57: 1 *Yearbook* 222; cited in Sieghart, *Human Rights*, 105-6; see also Fawcett, J.E.S., *The Application of the European Convention on Human Rights*, (2nd ed., 1987), 314-6.

<sup>207</sup> NDI/NRI, *Bulgaria 1990*, 20, 23-4.

<sup>208</sup> Commonwealth Observer Group, *Ghana 1992*, 6-7,

<sup>209</sup> Commonwealth Observer Group, *Kenya 1992*, 6. The Green Party and the Green Party of Kenya were also denied registration for ‘security reasons.’

<sup>210</sup> Operative para. 6 of UNGA res. 46/130, ‘Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes,’ adopted 17 Dec. 1991 by 102 votes in favour, 40 against and 13 abstentions, ‘*Strongly appeals* to all States to refrain from financing or providing, directly or indirectly, any other form of overt or covert support for political parties or groups and from taking actions to undermine the electoral processes in any country...’ This is repeated in UNGA resolutions 47/130, 18 Dec. 1992 and 48/124, 20 Dec. 1993.

was authorized to allocate a specific amount to political parties, fifty per cent of which was to be divided between them in equal amounts, and the remainder on the basis of the numbers of votes received in the 1984 elections. Parties which did not contest the earlier ballot each received the same as the party with the fewest votes. Funds could also be received from abroad, half the amount going to the party in question, and the other half to the Supreme Electoral Council.<sup>211</sup> There was no bar on receiving overseas funds for the 1990 Czechoslovakia elections; otherwise, public funding turned on the percentage of votes received. Parties failing to receive 2 per cent received nothing, and those with more than 2 per cent received 10 crowns for each vote.<sup>212</sup> The Hungarian Parliament allocated a total of 700 million forints (US\$11.2 million) for opposition parties in 1990, which received grants initially on the basis of unverified membership claims.<sup>213</sup> Private fund-raising from inside and outside the country was also permitted, save that contributions from foreign governments were prohibited.<sup>214</sup> State subsidies for political parties were also payable in Romania, to cover initial costs and thereafter on the basis of the number of candidates fielded. Parties complained of late receipt of funds, putting them at a substantial disadvantage where the ruling party retained control of public resources.<sup>215</sup>

How much political parties are able to spend can clearly have an impact on the outcome of an election. Both a French parliamentary delegation to the Seychelles in July 1993 and the Commonwealth Observer Group in November registered a number of complaints, including the lack of balance in the resources of the parties.<sup>216</sup> How such balance can or should be maintained does not permit of any ready answer; the Commonwealth Observer Group in November 1992 considered that the details were a 'local political matter for the Government and the parties to resolve,' even though it also recognized the necessity to fund parties during the transition period.<sup>217</sup> Moreover, the US Supreme Court has held that expenditure limitations are unconstitutional, since they place

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<sup>211</sup> Organization of American States Secretary General. *Observation of the Electoral Process, Nicaragua 1989-90*. Observers' Guide. 1989.

<sup>212</sup> US Commission, *Central and Eastern Europe*, 127. Not surprisingly, considerable financial and material support was extended by West German to East German parties in the 1990 elections: *ibid.*, 15-16.

<sup>213</sup> *Ibid.*, 38. Also, Melia, T.O., 'Hungary,' in Garber & Bjornlund, *New Democratic Frontier*, 39, 53-4. The smaller parties objected to this system of apportionment, but it was maintained; although required to account for their funding, few parties had done so by the end of 1990.

<sup>214</sup> US Commission, *Central and Eastern Europe*, 38.

<sup>215</sup> US Commission, *Central and Eastern Europe*, 111; see also with respect to Slovenia (p.64) and Croatia (p.85).

<sup>216</sup> *Bulletin de l'Assemblée Nationale*, no. 14 du 5 oct.1993, 61; Commonwealth Observer Group, *Seychelles November 1992*, 14. The July mission was present for the election of a Constitutional Commission, which was also monitored by the Commonwealth; the November mission monitored the referendum on the draft Constitution.

<sup>217</sup> Commonwealth Observer Group, *Seychelles November 1992*, 14.

substantial direct restrictions on political expression and as such are prohibited by the First Amendment.<sup>218</sup>

The established democracies have come up with mixed responses to the issue of government funding, private contributions, and campaign expenses. In France, public financing is limited to 10 per cent of the maximum 500,000 francs allowed per candidate, and private contributions are regulated.<sup>219</sup> In the United Kingdom, the expenses of individual candidates are limited at general elections, but no restrictions apply to national advertising campaigns by political parties. Candidates must appoint an election agent to pay and account for their expenses, and to submit returns within thirty-five days of the election.<sup>220</sup>

Money played an important role in the December 1993 Russian elections. Limited financing for parties/blocs and individuals was available from the Central and District Election Commissions, contributions from foreign governments and entities were forbidden, but otherwise there were no controls and substantial sums were spent, for example, by Zhironovsky, to purchase expensive television time.<sup>221</sup> As Jean Gicquel has remarked, 'Les principales causes d'inégalités contre lesquelles il s'agit de se prémunir, au tant de moins de lutter, sont l'argent et les faveurs de pouvoir.'<sup>222</sup>

The rationale for public funding of political parties and election expenses is usually linked to the desirability of establishing, as far as possible, a 'level playing field'. Other reasons identified by Jean-Claude Masclet include a combination of freedom of association with the sovereignty of the people: public funding makes the political right *effective*.<sup>223</sup> It may also incidentally help to keep political parties independent of financial pressure, in situations where the role of parties is complex and often controversial.<sup>224</sup>

Democracy in practice, which requires choice between alternatives, needs at least two competing political parties, although competition that is too divisive defeats its purpose. In situations of transition, political parties

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<sup>218</sup> Limitations may be valid, however, where candidates adhere to them in order to receive public funding: Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 25, 1990-1991, 125.

<sup>219</sup> ECPRD, *Electoral System Legislation*, 261. For a more detailed account, see Masclet, Jean-Claude, *Droit électoral*, (1989), 244-65. Public funding linked to previous electoral performance has been upheld by the European Commission of Human Rights; see Application 6850/74: 5 *Decisions and Reports* 90.

<sup>220</sup> See Representation of the People Act 1983, sections 72-90; breaches attract severe penalties. In 1993, the limits (which may vary slightly depending on the type of election and type of constituency) were, for a county constituency in a general election, £4,330 plus 4.9p for every entry in the register of electors. See ECPRD, *Electoral System Legislation*, 469, 477.

<sup>221</sup> US Commission, *Russia 1993*, 27.

<sup>222</sup> Gicquel, J., *Droit constitutionnel et institutions politiques*. 12ème ed., 1993, 139.

<sup>223</sup> 'En d'autres termes, il existe pour l'Etat non seulement une faculté de financement public pour rendre la liberté et l'égalité effectives, mais aussi une obligation dans certaines circonstances qu'il appartient au législateur d'apprécier': Masclet, Jean Claude, *Droit électoral*, (1989), 251.

<sup>224</sup> For a summary account of some of the issues, see Pinto-Duschinsky, M., 'The Role of Political Parties,' in International Foundation for Election Systems. *Central European Electoral Systems Symposium, Budapest, July 30-August 2, 1991*. International Foundation for Election Systems. Washington, D.C., (1991), 74.

often face difficulties in establishing themselves, or in engaging in meaningful campaigns in face of monopolies of power and resources. Neither public nor external aid can be ruled out as impermissible, provided that generally they contribute to healthy debate within a strengthening democratic process. Where they become substitutes for grass roots support and effective local organization, however, then they may also cease to contribute to channelling the will of the people into genuine elections. Clearly, a free and fair election is less likely if the government denies financial resources to its opponents, while using all the resources at its disposal to put the opposition at a disadvantage. Equally, in theory at least, unlimited expenditure by any party can result in a distorted electoral process. The art is to find that balance which best accommodates the objective of allowing each party a reasonable opportunity to put across its message; this may well entail a combination of public funding with election expenditure controls.

### 3.1.8 *Electoral campaigns*

Systems and legal guarantees are only a part of the equation that produces a free and fair election. How procedures are actually applied and what happens in practice will ultimately determine whether the people have been able freely to express their will. Commenting on the inter-American system, the Inter-American Commission on Human Rights has remarked on the ‘direct relationship’ between political rights and ‘representative democracy as a form of the organization of the State, which at the same time presupposes the observance of other basic human rights’:

‘representatives...are elected by the citizens to apply certain political measures, which...implies the prior existence of an ample political debate on the nature of the policies to be applied - freedom of expression - between organized political groups - freedom of association - that have had the opportunity to express themselves and meet publicly - freedom of assembly.’<sup>225</sup>

The rule of law, moreover, above the will of the leaders, is essential to ‘preserve the purity of the expression of the popular will’.<sup>226</sup>

A successful election does not depend solely on what happens on ballot day; the totality of the process must be examined, including preliminary issues such as the nature of the electoral system, voter entitlement, voter registration, party organization and civic education.<sup>227</sup> The indices of a free

<sup>225</sup> *Final Report on Cases 9768, 9780 and 9828*: Inter-American Commission on Human Rights 97, para. 41. Above note 185.

<sup>226</sup> *Ibid.*, para. 42.

<sup>227</sup> For an overview of basic issues, see IPU, Questionnaire concerning Parliamentary Elections: IPU doc. CHR/93/1; OAS Secretary General, Observation of the Electoral Process, Nicaragua, 1989-90, Observers’ Guide; Council of Europe, *Handbook for Observers of Elections*, Strasbourg, 1992.



and fair election are especially important with respect to the conduct of the election campaign, at which point a number of fundamental human rights come into play, together with the responsibility of the State, as described in article 2 of the 1966 Covenant on Civil and Political Rights,

‘to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

Specifically, national and international observers will need to know whether freedom of movement, assembly, association and expression have been respected throughout the election period; whether all parties have conducted their political activities within the law; whether any political party or special interest group has been subjected to arbitrary and unnecessary restrictions in regard to access to the media or generally in regard to their freedom to communicate their views; whether parties, candidates and supporters have enjoyed equal security; whether voters have been able to cast their ballots freely, without fear or intimidation; whether the secrecy of the ballot has been maintained; and whether the overall conduct of the ballot has been such as to avoid fraud and illegality.<sup>228</sup>

The essentially human rights dimension to many political and electoral rights should not be ignored, so far as some of those applicable in the elections context may not be subject to any derogation whatsoever, while others may only be restricted in accordance with law and, among other limitations, to the extent reasonably necessary in a democratic society.<sup>229</sup> The settled jurisprudence of the United Nations Human Rights Committee and of regional protection mechanisms in Europe and the Americas confirms not only that the permissible areas of derogation must be interpreted restrictively, but also that the very derogations themselves can be subject to review.<sup>230</sup>

Notwithstanding the elements of appreciation involved, the effect of deficiencies or weaknesses in one or more fields must be weighed against the international free and fair elections standard. Perhaps not surprisingly, few elections in situations of transition allow for clear *fair/not fair* assessments; indeed, the role of observer missions is often not so much to engage in an

<sup>228</sup> Cf. Council of Europe, *Handbook for Observers of Elections*, Strasbourg, 1992; Organization of American States Secretary-General, *Observation of the Electoral Process, Nicaragua 1989-90, Observers' Guide*, n.d. See also the various ‘checklists’ and ‘observation notes’ annexed to Commonwealth Observer Group reports; for example, *Malaysia 1990; Bangladesh 1991; Zambia 1991; Kenya 1992; Ghana 1992*.

<sup>229</sup> The circumstances that may justify restrictions tend to vary with the right concerned; see the 1966 Covenant on Civil and Political Rights, for example, in particular art. 12(3)—freedom of movement; art. 19(3)—freedom of expression; art. 21—freedom of assembly; art. 22(2)—freedom of association.

<sup>230</sup> See for example on the interpretation and application of art. 9(3): McGoldrick, D., *The Human Rights Committee*, (1991), 461-71; and on restrictions and limitations generally, Sieghart, P., *The International Law of Human Rights*, (1983), 85-103



isolated verification exercise, as to facilitate the growth of democracy and the building of strong national institutions.<sup>231</sup> Typical instructions to Commonwealth observer groups, for example, emphasize the origins of their mission in a government invitation, supported by the political parties. The task of such a group is to observe every relevant aspect of the organization and conduct of the election in accordance with the law of the country concerned. It is to determine, in its impartial judgment and in the context of that law, whether the election or vote has been free and fair. However, it has no executive role, and is neither to supervise nor to act as a commission of inquiry.<sup>232</sup>

Just as democracy is not founded on a single ballot, so an election does not become *unfree* or *unfair* solely by reason of one or more breaches of international standards. In many cases, too, the observer's task will be to help establish the range of permissible variation from the standard norm, applying the relevant international standards to particular local circumstances. Here, it will often be necessary to ask whether the 'wrong' done in fact had an impact on the election; this reflects international law's concern with *results*, rather than with 'technical' infringements. In this context of progressive development, the observer's responsibility is certainly to pinpoint egregious violations of election rights, but also to keep them in context and to indicate how and where improvements can be made.<sup>233</sup>

On occasion, however, either the basic conditions or the cumulative effect of incidents may tip the balance to a negative assessment. In November 1993, for example, the US Department of State was reported as saying that elections in Equatorial Guinea risked becoming a parody of democracy, because of the brutality and repression of the regime.<sup>234</sup> Different perspectives may

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<sup>231</sup> See Pierre Cornillon, Secretary General, Inter-Parliamentary Union, 'Rights and Responsibilities of Election Observers,' IPU, Geneva, Mar. 1994.

<sup>232</sup> The Observer Group reports to the Commonwealth Secretary General and to the Government of the country concerned, and thereafter to the leadership of the political parties contesting the vote. The terms of reference for such observer missions are more or less identical; see, for example, those for the mission to observe the constitutional referendum in Seychelles in November 1992: Commonwealth Observer Group, *Seychelles November 1992*, 2. Adopted in Zimbabwe in 1991, the Harare Commonwealth Declaration established as a priority the promotion of the association's fundamental political values, including democracy, democratic processes and institutions which reflect national circumstances, human rights, the rule of law, and just and honest government. Heads of Government agreed that, besides advice and technical assistance, one way to strengthen democracy was to assist members to reinforce their election and other constitutional processes through the institution of observer missions at the request of member governments: Commonwealth Observer Group, *Ghana 1992*, 1-2.

<sup>233</sup> See for example the general conclusions of French parliamentary delegations to observe elections in Pakistan, Seychelles, Central African Republic, Burundi, Djibouti and Senegal during the course of 1993: *Bulletin de l'Assemblée Nationale*, no. 7 du 8 juin 1993, 43, 44; no. 8 du 15 juin 1993, 43; no. 14 du 5 oct. 1993, 61, 62; no. 16 du 20 oct. 1993, 44-5. Cf. *Keesing's Record of World Events*, News Digest for March 1993, 39251, reporting Lesotho's general election in the presence of some 130 observers from 29 countries under the auspices of the UN as 'free and fair', despite some shortcomings in the distribution of election materials. See also below, section 3.2.

<sup>234</sup> *Le Monde*, 21 nov. 1993; see also *ibid.*, 20 nov. 1993. The French and Spanish governments declined to send observers, 'en raison "des conditions d'organisation du scrutin, qui privent les élections de leur caractère vraiment pluraliste"...' *Ibid.*, 24 nov. 1993.

nevertheless produce different assessments. The December 1992 Kenya Elections were also judged by some observers not to have met the free and fair standard. The Attorney General attempted to shorten the nomination process for opposition parties; legislation preventing meetings of more than three persons without a permit was used to prevent opposition rallies; journalists and opposition activists were arrested and detained without charge; and villages were attacked, crops burnt and meetings disrupted throughout the campaign.<sup>235</sup> The Commonwealth Observer Group's final assessment was that the elections constituted an important turning point:<sup>236</sup>

'Despite the fact that the whole electoral process cannot be given an unqualified rating as free and fair, the evolution of the process to polling day and the subsequent count was increasingly positive to a degree that we believe that the results in many instances directly reflect, however imperfectly, the expression of the will of the people. It constitutes a giant step on the road to multi-party democracy.'

Whether such optimistic assessment will be borne out remains to be seen. One advantage of this approach may be that it facilitates the continuation of dialogue, and therefore also of pressure to bring national practice into line with international standards.<sup>237</sup>

### 3.1.8.1 *Human rights and the election environment*

A peaceful campaign, of course, is not solely the responsibility of the government. The tolerant climate in Bulgaria during the 1990 elections, for example, was attributed in large measure to the conduct of the political parties, which in turn was assisted by periodic meetings among party leaders at national and regional level.<sup>238</sup> Rallies were held generally without interference, although there were some incidents of damage to party buildings and campaign materials, and also of intimidation.<sup>239</sup> In Nicaragua, too, the parties moved quickly and effectively to quell pre-election violence, agreeing with outside help on a set

<sup>235</sup> See International Republican Institute, *Kenya: The December 29, 1992 Elections*, 1993, 32; National Election Monitoring Unit (NEMU), *The Multi-Party General Elections in Kenya*, 1993.

<sup>236</sup> Commonwealth Observer Group, *Kenya 1992*, 39, 40. On the positive side, the Group noted the improvement in the performance of the Electoral Commission over time; a similar and ultimately more successful experience - an opening up of the political system - was recorded in Nicaragua in 1989-90: *Freely Elected Heads, Nicaragua 1989-90*, 12, 25-6.

<sup>237</sup> This also perhaps explains why the Commonwealth Observer Group were 'deeply saddened' by the opposition parties' rejection of the presidential election results in Ghana in 1992, despite their earlier commitment to accept them, and why they were encouraged by the hope that the parties would nonetheless choose to remain with the process and contest the parliamentary elections: *Ghana 1992*, 59-61.

<sup>238</sup> NDI/NRI, *Bulgaria 1990*, 35-6. During the Cambodia elections in 1993, the UN likewise organized regular inter-party meetings, as a contribution to the resolution of disputes and reduction of friction. On Codes of Conduct, see further below, section 3.1.8.3.

<sup>239</sup> Cf. NDI/Carter Center, *Zambia 1991*, 44-7.

of guidelines to bring it to an end.<sup>240</sup> Violence and harassment were particularly evident features of the 1990 election campaign in Pakistan, including murders, kidnapping and robberies.<sup>241</sup> Serious violence occurred again in 1993, although an international observer delegation noted a significant improvement in the pre-election environment, compared to 1990. The government had sought to create an atmosphere in which the elections would be administered impartially, and the parties agreed that the government had succeeded in promoting an open, competitive process.<sup>242</sup>

The Joint International Observer Group (JIOG) in Malawi in 1993 for the national referendum noted that campaign conditions improved over time. To begin with, opposition activists found it difficult to hold meetings; permits were refused, or cancelled or only granted at the last minute; government party meetings, on the other hand, often gained priority or did not require permission. Some individuals were arrested and detained, and there were assaults, threats and intimidation, including failure by the police to intervene.<sup>243</sup> The JIOG invited all victims of harassment or intimidation to submit formal complaints in writing, and a number of serious, verified incidents were reported. Dismissals and arrests led the European Community to complain that the Malawi authorities had ‘failed to reach acceptable standards of democratic campaigning.’ Both sides at times also breached the prohibition of ‘inflammatory, defamatory, or insulting’ language. The general situation improved, however, as the campaign progressed.<sup>244</sup>

Violence and intimidation were major features of the 1990 elections in Romania, almost all of it directed against opposition members. Moreover, the government and incumbent president made ‘no overt effort to help ensure a safe, tolerant and pluralistic campaign.’<sup>245</sup> Experience here provided a marked contrast to the peaceful conduct of elections in Czechoslovakia and Bulgaria.<sup>246</sup>

There may be cases of transition, for example, from war to peace, where, regrettably but realistically, higher levels of violence must be accepted as part of the movement towards representative democracy. In other situations,

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<sup>240</sup> Freely Elected Heads, *Nicaragua 1989-90*, 18.

<sup>241</sup> NDI, *Pakistan 1990*, 52-4. The general election in Jamaica in March 1993 was also marred by violence, despite the code of conduct signed by political leaders committing all candidates to restrain their supporters: *Keesing's Record of World Events*, News Digest for March 1993, 39360. On violence in Kenya, see Commonwealth Observer Group, *Kenya 1992*, 23-4. The Group concluded that the Government could have made a greater effort to create a multi-party climate, and to promote greater public awareness and tolerance; in addition, all the parties could have done far more to control the worst excesses of their supporters: *ibid.*, vii, x.

<sup>242</sup> NDI Preliminary Statement. International Observer Delegation to the Pakistan National Elections, 8 Oct. 1993.

<sup>243</sup> See also comment by the Inter-American Commission on Human Rights with respect to politically related human rights in Paraguay in 1987 and Panama in 1989: reports cited in *Final Report on Cases 9768, 9780 and 9828*: IACmHR, 97, paras. 56, 61. Above note 185.

<sup>244</sup> JIOG, *Malawi 1993*.

<sup>245</sup> Garber & Bjornlund, *New Democratic Frontier*, 83, 86f.

<sup>246</sup> *Ibid.*, at 125, 146. Likewise to that in Bangladesh in 1991: Commonwealth Observer Group, *Bangladesh 1991*, 28

however, less tolerance may be due where a government fails to react promptly and effectively to violence and intimidation, thereby putting at issue its own commitment to an open, democratic process.<sup>247</sup>

### 3.1.8.2 *Media access and coverage*

Given that a choice between government and policy alternatives is central to the democratic ideal, access to the media in modern society is self-evidently crucial to the dissemination of party platforms and programmes. As the CSCE Copenhagen Document puts it, ‘no legal or administrative obstacle (should stand) 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.’<sup>248</sup> Only if such facilities are available, will candidates effectively enjoy the right to express themselves freely, including by way of criticism,<sup>249</sup> and electors take the benefit of the freedom to seek and receive information.<sup>250</sup> Regrettably, the importance of these rights to the democratic and electoral process is only too well emphasized by the struggle to control media access, and by the abuse of such control, particularly in societies in transition, where broadcasting and newspapers have long been a government monopoly.<sup>251</sup>

The dangers of central control were nowhere more in evidence than in the 1990 Romanian elections.<sup>252</sup> Even though the electoral law provided for television and radio time, the opposition,

<sup>247</sup> The Inter-American Commission on Human Rights has noted that a government’s connection to violence may ‘modify the basic conditions of equality under which elections must be held’: *Final Report on Cases 9768, 9780 and 9828*: Inter-American Commission on Human Rights 97, para. 74. Above note 185.

<sup>248</sup> Para. (7.8), above section 2.6.

<sup>249</sup> See *Oberschlick v. Austria*, Case No. 6/1990/197/257, European Court of Human Rights, 23 May 1991. The Court noted that freedom of the press afforded the public one of the best means of discovering and forming an opinion of the ideas and attitudes of political leaders. More generally, freedom of political debate was at the very core of the concept of a democratic society and the limits of acceptable criticism were accordingly wider with regard to a politician acting in his or her public capacity than in relation to a private individual.

<sup>250</sup> Art. 19, 1966 Covenant on Civil and Political Rights; above, section 2.3. As the US delegate to the UN Third Committee noted in a related context in 1972: ‘freedom of choice is indispensable to the exercise of the right of self-determination. For this freedom of choice to be meaningful, there must be corresponding freedom of thought, conscience, expression, movement and association. Self-determination entails legitimate, lively dissent and testing at the ballot box with frequent regularity.’ Dept. of State Bulletin, 25 Dec. 1972, no. 1748.

<sup>251</sup> The democratic process may also be threatened by excessive licence, where political issues and choices are overshadowed by personal attacks. The media in the 1992 Ghana elections were considered often to have overstepped the line between free speech and muck-raking; the idea of a ‘Code of Conduct’ for the media was suggested: Commonwealth Observer Group, *Ghana 1992*, 45-9; cf. Commonwealth Observer Group, *Guyana 1992*, Annex X, Guidelines for Media and Political Parties. See further below, section 3.1.8.3; also, Goodwin-Gill, *Codes of Conduct for Elections* (1998).

<sup>252</sup> ‘The campaign was systematically unfair. The Front enjoyed all the advantages of having assumed the reins of an absolutist state and exploited these advantages to the maximum. The opposition suffered from a lack of every possible resource...’: Carothers, T., ‘Romania’, in Garber & Bjornlund, *New Democratic Frontier*, 83.

‘suffered from limited access to programming, unpredictable placement and uneven access to recording studios and equipment...Television news coverage of the campaign was blatantly and consistently biased toward the Front...(and)... its bias constituted a major structural advantage...’<sup>253</sup>

The situation with respect to newspapers was no better; the supply of materials, printing facilities and the distribution network remained in government hands, and opposition parties were regularly intimidated to discourage publication.<sup>254</sup>

In other East European countries, media access and media activities were not always free from criticism, even if the margin of abuse never reached the same degree. In Hungary, for example, candidates repeatedly complained of uneven coverage, although access remained generally non-partisan.<sup>255</sup> In Bulgaria, new newspapers sprang up, but opposition papers tended to suffer from limited print-runs in government controlled facilities. Both television and state-owned newspapers did provide other than the ‘official line’, but as one commentator observed, ‘given the realities of a transition period, the opposition never achieved full equality in their ability to use the media.’<sup>256</sup> In Czechoslovakia, all parties were granted four hours each of free radio and television time, and placement was determined by a computer-generated random schedule.<sup>257</sup>

Media coverage was problematic in the referendum campaign in Malawi, given the monopoly of the Malawi Broadcasting Corporation (MBC). The MBC provided extensive coverage to the President, but little to multi-party advocates. Programming was unbalanced at the beginning of the campaign, and did not maintain the neutrality or equality of treatment required

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<sup>253</sup> Ibid., at 84.

<sup>254</sup> Ibid. See also US Commission, *Central and Eastern Europe*, 110-11.

<sup>255</sup> US Commission, *Central and Eastern Europe*, at 38f; also Melia, T.O., ‘Hungary,’ in Garber & Bjornlund, *New Democratic Frontier*, 54-5.

<sup>256</sup> Garber, L., ‘Bulgaria,’ in Garber & Bjornlund, *New Democratic Frontier*, 148. Cf. CSCE Office for Democratic Institutions and Human Rights, ‘International Observation of the Referendum held in the Russian Federation on April 25, 1993’: political parties had had roughly equal possibilities to convey their views to the electorate. The printed media reflected a broad spectrum of views; the electronic media, mostly in pro-Government hands, allowed significant time to opposition viewpoints. The CSCE report nevertheless recommended a law on access by political parties to state-run television and radio during an election campaign.

<sup>257</sup> For comment, see Carnahan, R. and Corley, J., ‘Czechoslovakia,’ in Garber & Bjornlund, *New Democratic Frontier*, 126-7. Cf. the situation in the Cameroon, where broadcasting time was divided among the parties on the basis of the number of candidates running. News coverage, however, was unevenly balanced in favour of the president: NDI, *Cameroon 1992*, 30-3. For an assessment of the media role in Zambia, see Commonwealth Observer Group, *Zambia 1991*, 10, noting that both parties had a fair chance to present their message in the government controlled media; NDI/Carter Center, *Zambia 1991*, 41-3. See also, NDI, *Pakistan 1990*, 49-52, 113-4; NDI Preliminary Statement. International Observer Delegation to the Pakistan National Elections, 8 October 1993, noting that the electronic media had provided generally balanced coverage and also access for some twenty-two parties to present their message directly to the people. The printed media was also accessible, and enjoyed freedom in political reporting. Cf. Commonwealth Observer Group, *Malaysia 1990*, 13-16 (balanced picture not available because of denial of adequate coverage of opposition personalities and policies); Commonwealth Observer Group, *Kenya 1992*, 26-7, 39 (lack of a free press was evident; state-owned broadcasting media were partisan).

by the referendum regulations. Presidential rally broadcasts also tended to take precedence, even over civic education programmes. The main newspaper, the *Daily Times*, was government-owned, and opposition newspapers could not compete, although a ban on two papers was lifted after a court order. Campaigning by opposition groups was made more difficult by the lack of transport facilities and organizational experience, and by unequal access to campaigning basics, such as public address systems.

Reviewing the Senegalese electoral code in 1991, the NDI recommended that an 'equitable formula', which might take account of media strength and track record, 'should be devised that ensures all parties an adequate opportunity to communicate their positions to the electorate through the media.'<sup>258</sup> In its preliminary review of the 1993 Senegalese presidential elections, the NDI noted that media access had considerably improved, but that state-controlled media tended to favour the incumbent.<sup>259</sup> Article 36 of the UN Electoral Law for Cambodia and UN practice leading up to the 1993 elections provide an international perspective on the principle of media access. The law stipulated that to ensure fair access to the media for all political parties contesting the election, all newspapers and broadcasting media controlled by public authorities should be made available to the UN at no cost, for the purpose of publicity and electoral education. Attempts to block access were resisted by the United Nations Transitional Authority in Cambodia (UNTAC), which also organized special television panels at which party representatives were able to air their policies. In addition, UNTAC's own radio transmitting 15 hours daily was made available on an equal basis to all parties contesting the election.<sup>260</sup> An October 1993 decree in Russia provided for equal access to the mass media, especially the state-owned radio and television networks, for all candidates and parties. In the lead-in to the December elections, both networks allocated one hour per night, with the order of appearance decided by lottery.<sup>261</sup> Although equal time was given, however, the news coverage was reported as generally pro-government.<sup>262</sup>

The principle of equal access to the media is widely accepted in established democracies. The formulae may vary, but the underlying premise is the same: those competing in an election should have a reasonable opportunity to get their message across. Danish radio and television guidelines, for example, assure *equal access* to all registered parties, and *equal time*, regardless of the size of the party; paid advertisements on radio and television,

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<sup>258</sup> NDI, *Senegal 1991*, 30-1.

<sup>259</sup> National Democratic Institute for International Affairs. 'Executive Summary. February 21, 1993 Presidential Elections in Senegal.' International Delegation Report. Washington, D.C. 1993.

<sup>260</sup> See IPU, 'Report of IPU Election Observer Mission, Cambodia, 16 May-4 June 1993,' Geneva, (1993), 7-8

<sup>261</sup> US Commission, *Russia 1993*, 10, 17.

<sup>262</sup> *Ibid.*, 17.



however, are not allowed.<sup>263</sup> In France, radio and television time is divided equally between majority and opposition parties, although parties not represented in the legislature receive only seven minutes airtime.<sup>264</sup> In the United Kingdom and Ireland, television and radio time is decided by committees comprising the broadcasting authorities and the parties, but again paid advertisements are not permitted, other than in the press and on hoardings.<sup>265</sup> Ireland has a statutory requirement of fairness, objectivity and impartiality with respect to radio and television, but not the press.<sup>266</sup> In the United Kingdom, candidates may take part in election campaign programmes about their constituencies, only if all their rival candidates either also take part or agree that the programme can go ahead.

Access and fair and balanced coverage are thus the two main issues, with the ‘appropriateness’ of paid advertising finding different responses, both in established and emergent democracies.<sup>267</sup> In a recent decision, the Australian High Court considered different perspectives when it held that a provision prohibiting all paid political advertising in the electronic media to be unconstitutional.<sup>268</sup> The prohibition violated the implicit protection of freedom of political communication because, in particular, it also allowed free airtime to be allocated to political parties in such a way as to give an unfair advantage to incumbent candidates and parties represented in the previous legislature; no provision was made for organizations and associations to have paid or unpaid access to the electronic media. In its judgment, the Court indicated that the prohibition of paid political advertisements would probably be upheld, if part of a package ensuring fair access for all political players.

A recent review of election broadcasting proposes some sixteen guidelines, drawing on international human rights law and prevailing practice among established democracies.<sup>269</sup> Among those classified as mandatory are the obligation of government media to inform the public, to grant access and accord unbiased coverage, to abolish or suspend restrictions on public comment, to punish attacks on media personnel, to refrain from censorship, to grant

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<sup>263</sup> ECPRD, *Electoral System Legislation*, 62. See also *Wilson v. Independent Broadcasting Authority* (1979) S.L.T. 279; although three out of four political parties supported devolution in a Scottish referendum, the court ruled that broadcasting time should be allocated equally to both sides of the question. Cited in Merloe, below note 267, 83.

<sup>264</sup> *Ibid.*, 259; also Masclat, *Droit électoral*, 232-4.

<sup>265</sup> ECPRD, *Electoral System Legislation*, 303-4, 476-7.

<sup>266</sup> *Ibid.* Private media are frequently problematic. The linkage of major newspapers to the government has long given rise to concern in Mexico, as has biased reporting by the principal television stations: Freely Elected Heads, *Reform in Mexico*, 7.

<sup>267</sup> See generally Merloe, P., *Election Campaign Broadcasting in Transitional Democracies: Problems, Principles and Guidelines*. Prepared for Article 19, the International Centre against Censorship. Pre-publication draft. August 1993.

<sup>268</sup> *Australian Capital Television Pty. Ltd. v. The Commonwealth; New South Wales v. The Commonwealth* (No. 2) (1992) 66 A.L.J.R. 695, discussed in Merloe, above note, at pp. 16-19.

<sup>269</sup> See Merloe, P., *Election Campaign Broadcasting in Transitional Democracies: Problems, Principles and Guidelines*, 1993, 61-84.



access on a non-discriminatory basis to all parties, to ensure balance and fairness, to provide education for voters, and to provide for judicial review of broadcasting-related decisions. A comprehensive and structured approach to such influential media is clearly called for, if electors are to understand the choices available.

### 3.1.8.3 *Codes of Conduct*

Codes of Conduct agreed between the parties are increasingly accepted in potentially tense situations as a practical basis for contributing to a peaceful election; in the long term, such codes may also help to develop confidence in the democratic process as a mechanism for implementing representative government and effecting peaceful change. Article 7 of the Elections Annex to the *Comprehensive Settlement Agreement* for Cambodia, for example, provided that 'Adherence to a Code of Conduct established by UNTAC in consultation with the SNC (Supreme National Council of Cambodia) will be a condition for...participation' in the elections. The Code laid down the basic campaign freedoms to be enjoyed by all parties, but also repeatedly stressed the prohibition of intimidation, violence and possession of weapons at political meetings. The parties agreed to advise UNTAC of planned rallies and, in cooperation and liaison with the UN, to avoid coinciding with meetings by other parties. All parties also undertook, in effect, to educate their supporters in the meaning of democracy, for example, by emphasizing the secrecy of the ballot and that no one will ever know how an individual has voted.

Perhaps the most important element in the Code for Cambodia was the arrangement that all parties should meet at least once every two weeks with the UN Chief Electoral Officer, to discuss any matters of concern arising in the campaign. By thus establishing a regular channel of communication between the parties, the UN was able to anticipate and avoid incidents and misunderstandings that might otherwise have led to violence.<sup>270</sup>

Other Codes of Conduct have followed a similar direction. That adopted in Ghana in October 1992, for example, included a provision whereby the losing candidates undertook to concede defeat on the Electoral Commission declaring a free and fair election. The Seychelles Code included a section dealing with conduct relating to posters and banners, while guidelines adopted for Guyana's 1992 election specifically focused on the media and political parties.

A crucial problem in transition situations is often the failure of competing parties to communicate with each other, together with a lack of confidence in the ability of the system to produce a free and fair result. Codes

<sup>270</sup> For comment on the Cambodia experience, see IPU, *Report of IPU Election Observer Mission, Cambodia, 16 May-4 June 1993*, Geneva, (1993); for text of the Code of Conduct, see *ibid.*, Annex II; also, see Goodwin-Gill, *Codes of Conduct for Elections*, (1998), the annexes to which also provide other examples of such codes.

of Conduct, in which the parties agree on the basic ground rules and to meet regularly during the campaign period, clearly contribute not only to the avoidance of potentially dangerous confrontation, but also to popular support for the democratic process.

### 3.1.9 *Balloting, monitoring and results*

Although the fairness of any election is unlikely to be determined solely by reference to what happens on election day, the actual process of balloting deserves particular attention. Among other issues, balloting raises the question of the location of polling stations, and their accessibility for the population; the presence of competent officials, versed in the procedure; the presence of party representatives; secrecy of the act of voting and the security of the ballot box; the integrity of the counting process and its translation into a genuine political result. Broken down still further, balloting also involves the organization and management of voting, including the opening and closing of polling stations at stated times; the arrangement of booths and the orderly movement of voters; the identification and verification of voters (hence the importance of a credible registration system, discussed above); an established procedure for objection and challenge; the issue of ballot papers to recognized voters; the marking of ballot papers out of sight of officials or other electors; the deposit of marked ballots; and, in the absence of other sufficient guarantees, the identification of voters, for example, with indelible ink, in order to prevent double voting. The counting process in turn requires measures to ensure that ballot boxes are empty before voting begins, that they are secure when polling stations are closed, or during any period of transit,<sup>271</sup> and that votes are tallied in a process that inspires confidence in the electorate.

The fundamental rules relating to the exercise of electoral rights centre on non-discrimination, access to the poll and the act of voting, equal and universal suffrage, secret ballot and guarantees that the results of the vote shall reflect the free expression of the will of the electors. The present discussion is limited to these critical issues, referring back where appropriate to earlier comment.

First, the international legal principle of *non-discrimination* requires that no one shall be denied or prejudiced in the exercise of rights for reasons considered irrelevant, such as race, colour, sex, language, religion, political or other opinion, national or social origin, birth or other status. This principle touches practically every aspect of the electoral process, from registration

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<sup>271</sup> During its observation of the Cambodia election in 1993, the IPU delegation followed up reports that ballot box seals had broken during transit to safe areas. After inspecting the seals and witnessing transport conditions, it expressed its satisfaction that the breaking had been accidental (largely because of the quality of the seals, coupled with the equally poor road conditions), that UNTAC had taken prompt corrective measures, and that there was no evidence to suggest that the ballot had been affected in any way or that any party had gained as a result. *Report of IPU Election Observer Mission, Cambodia, 16 May-4 June 1993*, paras. 38-41, 57.

onwards. It is explicit in the principle of universal suffrage, discussed above, and inherent in the right to have access both to the ‘machinery’ of voting (the electoral roll, voting materials), and to the polling booth itself. Access here means not only physical access, in the sense of freedom from violence or intimidation,<sup>272</sup> or from obstruction by police or extra-government forces; but also accessibility, in the sense that polling booths should be so sited that voters do not have to travel far.<sup>273</sup>

The principle of *equal suffrage*, described above,<sup>274</sup> also requires that no vote shall have greater value than any other vote. This touches on constituency delimitation, but also has practical implications at the polling station level, in that measures must be taken to guard against multiple voting, by scrupulously checking voter cards, marking voters with indelible ink, or both.

The *secrecy of the ballot* is one aspect of the process which permits of scarcely any qualification. Once considered just one of several ‘equivalent free voting procedures’,<sup>275</sup> the secret ballot now stands alone and absolute, and is frequently elevated to the level of constitutional law or protected by other statutory rules.<sup>276</sup> The few remaining contrary instances are either on the wane or must be appreciated in their particular historical context.

The principle ran into ‘traditional’ objections in Senegal, where a secret vote was available as an option, but the practice of *not* using a voting booth was widely accepted. Opposition critics argued that this very practice itself created pressure to vote publicly in such a way as not to display disloyalty to government.<sup>277</sup> NDI in turn recommended that a mandatory secret ballot be instituted, which came into effect for the first time in the 1993 presidential elections.<sup>278</sup> Similar concerns have emerged in Kenya, Nigeria and Uganda. The 1988 election in Kenya involved the ‘public queuing system’ at the key primary level, under which voters publicly lined up behind photographs of their preferred candidate. Critics at the time noted that the intimidation inherent

<sup>272</sup> During the elections in New Caledonia in 1988, roadblocks prevented access to several *bureaux de vote*, and violence also took place. Fourteen bureaux could not open, and three others could not remain open for the full voting period. The *Conseil constitutionnel* annulled the votes from three bureaux, but given the national character of the ballot, considered that though they were serious, the incidents in question were not sufficient to justify invalidating the election as a whole: Masclet, J.-P., *Droit électoral*, 268-9.

<sup>273</sup> A guiding principle in Ghana’s 1992 elections and Malawi’s 1993 referendum was that no one should have to travel more than 5 kilometres to vote: Commonwealth Observer Group, *Ghana 1992*; JIOG, *Malawi 1993*.

<sup>274</sup> Described above, section 3.1.2.

<sup>275</sup> Compare art. 21(c), Universal Declaration of Human Rights and art. 25(b), 1966 Covenant on Civil and Political Rights.

<sup>276</sup> Cf. art. 3(3), Constitution of France: ‘Le suffrage peut être direct ou indirect dans les conditions prévues par la Constitution. Il est toujours universel, égal et *secret*’. Cited in Masclet, *Droit électoral*, 270.

<sup>277</sup> The discouragement of such ‘public voting’ and the preservation of the principle and practice of the secret ballot explain why ballots that allow the elector to be identified are frequently considered null and void. Cf. Masclet, *Droit électoral*, 272, 295-6.

<sup>278</sup> NDI, *Senegal 1991*, 33-4; National Democratic Institute for International Affairs. ‘Executive Summary. February 21, 1993 Presidential Elections in Senegal.’ International Delegation Report. Washington, D.C.

in this process was amply confirmed by the results, in which no candidate critical of the ruling party or of government policies was selected.<sup>279</sup> A secret ballot was in principle required for the 1992 elections in Kenya, but in practice it was often compromised by poor layout of polling stations, inadequate screens and insufficient management of voting streams. The process for marking the ballots of illiterate voters in the presence of all party agents also re-opened the way to a public voting system, especially in rural areas where large numbers of voters were illiterate.<sup>280</sup>

A related issue to involve the UN Electoral Assistance Unit in the preparations for Malawi's national referendum concerned the use of one or two ballot boxes. The government initially proposed a system of separate boxes: rather than marking a ballot, the voter places a ballot in whatever box represents the desired choice, thus making voting easier for a largely illiterate population. The UN, however, argued for a single box, on the ground that if voting is done in secret, one or other of two boxes may be easily stuffed with extra ballots or tampered with in other ways. With the agreement of the government, an outside expert was brought in, who in turn proposed the use of a single ballot box and two ballot papers, representing the two choices. The system had been successfully used in Mali, Guinea, Senegal and Eritrea, and was accepted by the government.<sup>281</sup>

The question of secrecy also came up in Bulgaria in 1990, in one area because of the transparency of the ballot envelopes, in another because of the composition or placement of polling booths.<sup>282</sup> Similar complaints were heard in Romania, where election officials were also seen to 'help' voters inside the

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1993. 'Public voting' still prevails in parts of Switzerland, one of the oldest-established democracies, and is the reason why that country has not so far ratified Protocol 1 of the European Convention on Human Rights. The *Landesgemeinde* is the supreme authority in five Swiss cantons, comprising an assembly of all active citizens meeting from time to time to deliberate affairs of state, to elect and to vote on legislative proposals. Although varying in detail from canton to canton, the *Landesgemeinde* combine electoral and legislative functions, in which voting takes place by show of hands. For comment, see Villiger, M.E., *Handbuch der Europäischen Menschenrechtskonvention (EMRK)*, Zurich, 1993, §33; Schweizer, R.J., 'Zur Stellung der Schweiz gegenüber Art. 3 der Zusatzprotokolls zur Europäischen Menschenrechtskonvention (Gewährleistung von freien und geheimen Wahlen)', 41; Grisel, E., *Initiative et Référendum Populaires: Traité de la démocratie semi-directe en droit Suisse*, Dorigny, 1987, section VI.

<sup>279</sup> See Department of State, *Country Reports on Human Rights Practices for 1988*, 155-68 (1989), describing the practice; and Human Rights Watch and Lawyers Committee for Human Rights, *Critique: Review of the Department of State's Country Reports on Human Rights Practices for 1988*, 99-104 (1989), noting the inadequacy of the Department's criticism. Parliamentary elections in Nigeria in 1992 used the same voting system; the voter turnout of only 25 per cent was attributed in part to hostility to the 'open ballot': Inter-Parliamentary Union, *Chronicle of Parliamentary Elections and Developments*, No. 27, 1992-1993, 170. On Uganda, see *ibid.*, No. 23, 1989-1990, 123.

<sup>280</sup> Commonwealth Observer Group, *Kenya 1992*, 34-5.

<sup>281</sup> JIOG, *Malawi 1993*.

<sup>282</sup> NDI/NRI, *Bulgaria 1990*, 45-6.

booths.<sup>283</sup> The number of irregularities there and in Cameroon,<sup>284</sup> even if not ‘systematic’, contributed to the overall lack of confidence in the electoral process. The many values of secrecy include, in particular, the fact that it ensures the freedom of the elector, who is able to choose free of all pressure:

‘Le moyen le plus efficace de préserver la liberté de l’électeur est bien d’éviter que le sens de son vote ne soit connu: ainsi il n’est plus tenu par les promesses ou engagements qui lui auraient été indûment extorqués et il est à l’abri des menaces de ceux à qui son vote déplairait et qui pourraient avoir prise sur lui.’<sup>285</sup>

The record of electoral balloting nevertheless also contains many examples of impartial management by election officials, effective voting by electors familiar with the system and the requirements, and an effective process made transparent by the presence of party representatives, or poll watchers.<sup>286</sup> In France, each candidate may appoint one or more delegates who are authorised to be permanently present in places where the election is being held. Their job is to monitor electoral operations and to ensure that the *bureau de vote* functions correctly. At the count, they are called on to sign the record of the proceedings, to which they may add their own comments.<sup>287</sup> In the United Kingdom, those present include the presiding officer (who is in charge), polling clerks, on-duty police, the candidates, election agents and polling agents.<sup>288</sup>

International observers have repeatedly stressed the importance of monitors in building voter confidence and ensuring the integrity of the system. In Bulgaria, for example, representatives from at least two parties monitored the balloting at nearly every polling station. In addition, a non-partisan, civic organization, the Bulgarian Association for Fair Elections (BAFE) was present; and it was the *absence* of such monitors in Romania that helped to reduce voter confidence. Reviewing the 1993 national referendum in Malawi, the JIOG report concluded that ‘Domestic monitors are an important key to the fairness of any election. They are a check against errors, misconduct and fraud...their very presence should limit opportunities for wrong doing.’<sup>289</sup> The

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<sup>283</sup> Carothers, T., ‘Romania’, in Garber & Bjornlund, *New Democratic Frontier*, 90: ‘Given the tradition of surveillance and political repression...the lack of secrecy may have had a chilling effect on those contemplating voting for the opposition.’ See also the concerns expressed by the Council of Europe delegation to the Sept. 1992 elections: CE Doc. 6724, Add. V, pp. 8-9 (1 Feb. 1993).

<sup>284</sup> NDI, *Cameroon 1992*, 36-41.

<sup>285</sup> Masclat, J.-P., *Droit électoral*, 270.

<sup>286</sup> For examples and descriptions of procedure, see JIOG, *Malawi 1993*; NDI Preliminary Statement. International Observer Delegation to the Pakistan National Elections, 8 October 1993; NDI/Carter Center, *Zambia 1991*, 52-3 (noting minor irregularities); NDI/NRI, *Bulgaria 1990*, 42-6; US Commission, *Central and Eastern Europe*, 40-2 (Hungary).

<sup>287</sup> Masclat, J.-P., *Droit électoral*, 279.

<sup>288</sup> ECPRD, *Electoral System Legislation*, 487ff.

<sup>289</sup> JIOG, *Malawi 1993*, para. 124.

duties of such monitors, as described in the report, show the practical ways in which a representative presence can build public confidence by ensuring that the polling station arrangement is correct and that the ballot box is empty and sealed before voting; checking against the impersonation of voters; checking that no one is denied the right to vote without cause; ensuring that the vote is truly secret; watching for unexpected problems; participating in decisions that require a departure from the rules, for example, on the need for additional boxes; preventing campaigning and intimidation around polling stations and in queues; ensuring that the polling station is correctly closed and that no one is prevented from voting; observing the count and agreeing on or challenging difficult decisions, for example, with respect to void or damaged ballots; and receiving a signed copy of the count, as a check on any tampering with ballots or with the result between the polling station and the district centre.<sup>290</sup>

States participating in the CSCE Copenhagen Meeting in 1990 expressed their view that ‘the presence of observers, both foreign and domestic, can enhance the electoral process...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.’ Despite the openness to outside presence, foreign observers run the risk of controversy, either because they are perceived as interfering, or because they do their job too well, or not at all.<sup>291</sup> Still, a considerable body of knowledge is now available to ensure that the job is well done. As one experienced commentator has observed,

‘a trustworthy election system is critical to ensuring the existence of a democratic form of government. When questions arise regarding the quality of the system, governments and nongovernmental organizations should be prepared to sponsor international observer delegations that can then determine whether a commitment to free and fair elections exists and, where appropriate, encourage ways to improve the electoral process.’<sup>292</sup>

Effective *local* monitors, either party representatives or recognized impartial officials, appear more likely to satisfy national aspirations for a free and fair

<sup>290</sup> Ibid. In its 1991 review of the Senegalese electoral code, the NDI recommended that the presence of party representatives as poll watchers be facilitated; this seems to have been achieved for the 1993 elections, at least for the balloting phase, if not for voter registration: Executive Summary, February 21, 1993 Presidential Elections in Senegal, April 8, 1993.

<sup>291</sup> For some of the possible difficulties, see NDI/Carter Center, *Zambia 1991*, 47-50, 61-5, 66-7; also Pierre Cornillon, Secretary General, Inter-Parliamentary Union, ‘Rights and Responsibilities of Election Observers,’ paper presented to the International Conference of La Laguna on Freedom of Elections and the International Observation of Elections, Tenerife, 27 Feb.-2 Mar. 1994. In Mexico, outside observers are still viewed with suspicion; domestic observers may be tolerated as individuals, but only under strict conditions: Freely Elected Heads, *Electoral Reform in Mexico*, 31.

<sup>292</sup> Garber, L., ‘The Role of International Observers,’ in Garber & Bjornlund, *New Democratic Frontier*, 211, 220.

electoral system. In situations of transition, however, national institutions may well be best developed and strengthened by remaining accessible to international observers and receptive to training and education programmes.

Finally, there is the *count* and, in appropriate cases, the *transfer of power* to the successful party in the election. Complementary to the principle of secret ballot is the integrity of the count, which looks both to ensure that the expressed wish of the elector is taken into account, and that the result declared corresponds with the totality of the votes cast. Sometimes, the ballots will be counted on the spot, and at others, the ballot boxes are transported to central or regional counting stations. In either case, transparency of process is as valuable as accuracy in counting. Transportation of ballot boxes commonly gives rise to fear of substitution, as happened in Panama in 1989; on the other hand, not to undertake central counting may lead, for example, to a small community being identified as having voted one way or the other, with a resulting possibility of prejudice in any later distribution of national resources.<sup>293</sup> Again, confidence in the process can be enhanced by the presence of party representatives both at the count and during any interim period of transport.

*Parallel voting tabulation* has also proven its value as a means of independently verifying the results reported by electoral authorities. In this process, monitors record results obtained from selected polling sites, and compare them with the official results:

‘The monitoring of vote counts as part of an overall election-observation effort can boost the confidence of voters suspicious of possible fraud, permit results to be projected more quickly than the official results, and allow for the identification of actual winners and the consequent exposure of any attempted manipulations.’<sup>294</sup>

In addition, as experience in Nicaragua in 1990 suggests, an early appreciation of the probable results obtained through parallel vote tabulation may help observers facilitate a peaceful transfer of power, through informed contacts with incumbent and opposition leaders.<sup>295</sup>

### 3.1.10 *Complaints and dispute resolution*

A free and fair electoral system depends not only on voter registration, free campaigning, monitors and secret ballots; it must also be able to deal promptly and effectively with the different types of complaint that will inevitably arise. These might include refusal of the right to stand as a candidate or to vote,

<sup>293</sup> Commonwealth Observer Group, *Zambia 1991*, 18-19.

<sup>294</sup> See generally Garber, L. and Cowan, G., ‘The Virtues of Parallel Vote Tabulations’ 4 *Journal of Democracy* 95, 106 (1993).

<sup>295</sup> Freely Elected Heads, *Nicaragua 1989-1990*, 25-6.



attempts to suppress voter turn-out,<sup>296</sup> alleged misinterpretation of the electoral laws or procedures, alleged violations of the criminal law, disputes regarding the accuracy of the count, or claims that the cumulative effect of such irregularities is so extensive as to invalidate the elections.<sup>297</sup> Generally, what is at issue is either the validity of the result, or the penalization of those who have violated electoral laws. The right to a remedy for violation of human rights is itself a human right,<sup>298</sup> while sanctions against those who infringe the provisions of the electoral law are implicitly required in any effective system of implementation. The integrity of the system requires not only that such issues be dealt with by an independent and impartial authority, such as the electoral commission or the courts, but also that decisions be reached in a timely manner, in order that the outcome of elections not be delayed. As with other aspects of the electoral process, the availability of such procedures must be open and known to the electorate and the parties.

Part of the process for anticipating and dealing with complaints includes much of what has been said above, including such practices as monitors and parallel vote tabulations. At the formal level, what is important is not so much the sanction, as the timeliness of the response. In cases of violence or intimidation, for example, what is needed is a prompt reaction, in order that continuing disturbances not interfere with the elector's essential freedom to choose. The tendency is for national systems also to try to deal expeditiously with errors of form, however. The ultimate objective remains that of establishing representative government, and the national interest is generally perceived as best met by the speedy resolution of potentially divisive issues.

### 3.2 Evaluation and Assessment

Determining whether an election is genuine and free and fair involves more than assessing whether electors turn up to vote; it requires a judgment on a dynamic and often evolving process, which itself often demands to be seen as a critical, if somewhat imperfect step in the direction of representative democracy. Many of the elections considered above left observers making 'on

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<sup>296</sup> See Thomas B. Edsall and Malcolm Gladwell, 'Probe Begins on NJ "Vote Suppressing" Claim' *The Guardian Weekly*, 21 Nov. 1993, p. 14 (from the *Washington Post*), reporting allegations that the campaign of Republican New Jersey Governor-elect Christine Todd Whitman spent hundreds of thousands of dollars to suppress black voter turnout, using 'walking around money' to persuade African-American ministers and Democratic ward and precinct workers not to engage in get-out-the-vote activities.

<sup>297</sup> Cf. NDI/NRI, *Bulgaria 1990*, 53-4.

<sup>298</sup> See, for example, art. 2(3), 1966 Covenant on Civil and Political Rights; art. 13, 1950 European Convention on Human Rights; art. 25, 1969 American Convention on Human Rights; art. 7, 1986 African Charter on Human and Peoples' Rights.

the one hand/on the other hand' assessments.<sup>299</sup> Each election was affected by local circumstances and the nation's particular historical moment, but together they have added to the repository of State practice from which international standards emerge or consolidate.

Observer experience is no less important when an election fails to meet those standards, and yet is not subject to overt manipulation. In Pakistan in 1990, the NDI's post-election review found that observers had confronted relatively few incidents of serious irregularity.<sup>300</sup> By that time, however, the opposition had already denounced the elections for 'massive fraud'; in the absence of concrete evidence, the international observer delegation refrained from condemning the elections, only thereby to lay itself open to the charge of failing to certify their fraudulent character:

'...the media and policymakers desire unequivocal evaluations of elections. However, the reality is that such evaluations sometimes are not possible, particularly when only some of the allegations can be corroborated and the cumulative effect of the irregularities on the process requires subjective judgments...Observer delegations in these circumstances should simply report the allegations and their observations, without necessarily addressing the ultimate question of whether the elections were or were not free and fair.'<sup>301</sup>

Putting the varied experience of international observer delegations, United Nations electoral assistance activities, and national laws and practices together with the existing rules and standards of international law allows for a reasonably coherent statement of the requirements for free and fair elections within today's system of inter-dependent States. Many key questions are as yet unanswered, including the extent to which, and 'against' whom, a people may claim a right to representative government, or the lawful extent of the international community's interest in every State's electoral process.

The following section presents those rules and principles which, on the basis of the above review, can be considered as possessing an absolute or near-absolute character. To these are attached other standards, many of which

<sup>299</sup> See, for example, Garber, L., 'Bulgaria', in Garber & Bjornlund, *New Democratic Frontier*, at 145: 'A final evaluation of the election campaign in Bulgaria...requires analyzing the extent to which all parties were able to communicate their messages and the degree to which the government affirmatively acted to eliminate inequities in the process. On the positive side, the campaign featured a broad spectrum of active parties; no legal or practical impediment prevented any political party from forming or competing in the elections. On the negative side was the disparity in resources available to the parties.' Garber later notes that absolute equality of opportunities for political parties, or even relative balance, is seldom possible: *ibid.*, at 156.

<sup>300</sup> NDI, *Pakistan 1990*, 80-1; see also NDI, *Cameroon 1992*, 52-5.

<sup>301</sup> *Ibid.*, 103-9, at 108; for the delegation's recommendations, see at 110-7. Cf. the assessment of the role of international and domestic observers in NDI/Carter Center, *Zambia 1991*, 67-9. See also the assessment by the Commonwealth Observer Group of the 1992 Kenya elections: above note 236 and accompanying text.

have been shown to contribute to the effective realisation of the goals set by general international law. In each case, the rules, principles and standards in question appear to reflect a broad consensus of opinion among both established and emerging democracies, the only distinction being the degree to which one or other may reflect a positive obligation, rather than a desirable standard or practice.

#### 4. INTERNATIONAL STANDARDS

International law sets specific objectives with respect to the holding of periodic free and fair elections, and lays down a variety of related obligations. Principally if not exclusively obligations of conduct, they leave States to decide how, in their particular political, cultural and historical context, the objectives may be best achieved. A margin of appreciation, however, is not the same as complete freedom of choice, and even where there is discretion, international law sets certain conditioning parameters. For example, the principle of non-discrimination not only excludes a number of disenfranchising measures or 'results', but also confines and structures choices regarding constituency delimitation and the relative weight of voting power, both considered in the light of the complementary principles of representation by population and equal suffrage. The rule with respect to the secret ballot crosses from an obligation of conduct to one of result; alternatives are *not* allowed. Instead, the State is bound to take such steps as are necessary to ensure not only that secrecy is observed and maintained, but also that the integrity of the choice so made is protected in the count that follows and in the implementation of the result.

Fundamental human rights, for example, to hold and express opinions, to receive and share information, as well as freedom of movement, association and assembly, all give specific content to, and thus limit, the choices open to States in the regulation of an electoral campaign. If the will of the people is to find expression in a genuine election involving policies and representatives, then human rights must be effectively respected and protected so as to allow an informed choice to be made; only the narrowest of limitations are permitted, commensurate with what is necessary in a democratic society and with the paramount consideration of ensuring that the election reflects the will of the people.<sup>302</sup>

The choices made by the State are thus to be applied so that they are *effective*, that is, oriented to the objective of a free and fair election; and in such a way as to take account of other obligations in the field of human rights.

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<sup>302</sup> At times, there will evidently be tension between one's appreciation of the needs of a democratic society and of what must be tolerated in order to ensure a free and fair election. These issues are by no means new in the human rights context, however, and are capable of objectively justifiable resolution without resort to overriding theories of national security.

Complementary principles of reasonableness and proportionality operate at the same time, to show when and where State choices, including omissions, fail to meet international requirements.

Obligations in international law are not generally self-executing—they need *implementation* at the domestic level. The complexities and inter-relationships between electoral rights and objectives seem clearly to require a statutory framework and appropriate machinery, but neither universal nor regional human rights instruments contain any formal obligation to enact electoral legislation. The practical choices open to States in meeting their international obligations are not unlimited, however, and certain means are increasingly preferred. Article 2(2) of the 1966 Covenant on Civil and Political Rights, for example, provides that ‘Where not already provided for by existing legislative or other measures, each State Party...undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative or other measures as may be necessary to give effect to the rights recognized...’ The objective of free and fair elections, with its foundation both in the recognition of individual rights and in the existence of regular and open procedures, limits the range of options. Legislation can thus be considered *essential* to establish the country-specific scheme of representation, to identify applicable human rights and their beneficiaries, such as who may vote, and to ensure the availability of effective remedies. It is not the final answer, however, for neither freedom nor fairness can simply be legislated into every corner of the electoral process.

From an international law perspective, what counts is what finally results, and a tradition of free and fair elections must be maintained and consolidated over the long-term. To this extent, election obligations and the goal of representative democracy have a *programmatic* dimension, anticipating progress in building democratic institutions, strengthening the confidence of the people in the democratic process, and leading to better and more democratic government. In the furtherance of these aims, therefore, States should

- take the necessary legislative steps to establish the rights and institutional framework for periodic and genuine free and fair elections, in accordance with their obligations under international law; and
- take the necessary policy and institutional steps to ensure the progressive achievement and consolidation of democratic goals.

This review of State practice, considered together with and as contributing to the governing rules and principles, suggests the following minimum international law standards applicable to elections which, for the purposes of summary classification, can be divided into three categories: (1) the goal or objective set

by international law; (2) the rights and responsibilities of individuals and political parties or groups; and (3) the combination of specific duties, programmatic obligations, responsibilities and entitlements incumbent on the State.

#### **4.1 The goal or objective**

International law's goal and the means by which it should be achieved can be stated quite simply: Every State should be possessed of a government whose authority derives from the will of the people as expressed by secret ballot in genuine free and fair elections held at regular intervals on the basis of universal and equal suffrage.

#### **4.2 The rights and responsibilities of individuals and political parties**

In their law and practice, States must recognize and make provision for:

- the right of the individual to vote, on a non-discriminatory basis, in parliamentary elections
- the right of the individual to access an effective, impartial and non-discriminatory procedure for the registration of voters
- the right of every eligible citizen to be registered as a voter, subject only to disqualification in accordance with clear criteria established by law, that are objectively verifiable and not subject to arbitrary decision
- the right of the individual whose right to vote or to be registered is negatively affected by an action or omission of the State or its officials to have access to a procedure competent to review such measures or to correct such errors promptly and effectively
- the right of the individual to have equal and effective access to a polling station in order to exercise his or her right to vote
- the right of the individual to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others
- the right of the individual to vote in secret, which right shall not be restricted in any manner whatsoever, and to respect for the integrity of his or her choice
- the right of the individual to present himself or herself as a candidate for election

In addition, individuals enjoy rights of association, for example, to establish or join political parties; and, together with such political parties, they in turn enjoy campaign and related rights. States therefore must provide for the following:

- the right of the individual to join, or together with others to establish, a political party for the purpose of competing in an election
- the right to express political opinions without interference otherwise than as permitted under international law
- the right to seek, receive and impart information and to make an informed choice
- the right to move freely within the country in order to campaign for election
- the right to campaign on an equal basis with other political parties, including the party representing the existing government
- the right to have access to the media, particularly the electronic media, in order to put forward their political views
- the right of candidates, political parties and party members to security with respect to their lives and property
- the right to the protection of the law and to a remedy for violation of political and electoral rights

Electoral and political rights carry responsibilities to the community; national legislation should also recognize,

- the obligation of the individual and of political parties not to engage in or incite violence
- the obligation of candidates, political parties and party members to respect the rights and freedoms of others
- the obligation of candidates, political parties and party members to accept the outcome of a free and fair election

#### **4.3 The rights and responsibilities of government**

Experience and recent State practice confirm the necessity for oversight of the electoral process, for institutionalized responsibility for implementation by impartial election officials, and for civic education. An oversight mechanism that enjoys the confidence of parties and electorate is especially pressing in situations of transition, for example, from single- to multi-party systems, or

wherever the impartiality of the administrative authorities is in doubt. The effective *institutionalization* of basic electoral and political rights obliges States not only to establish an appropriate electoral system and to implement international obligations in regard to the individual rights, but also,

- to provide for the holding of legislative elections at regular intervals
- to establish a neutral, impartial and/or balanced mechanism for the management of legislative elections
- to establish an effective impartial and non-discriminatory procedure for the registration of voters
- to lay down by law clear criteria for the registration of voters, such as age, citizenship and residence, and ensure that such criteria are applied without discrimination
- to lay down by law the regulations governing the formation, registration and functioning of political parties
- where appropriate in the circumstances, to provide for or regulate the funding of political parties and electoral campaigns, with a view eventually to promoting equality of opportunity
- to ensure the separation of party and State
- to establish the conditions for competition in legislative elections on an equitable basis
- to ensure that electors have a free choice by maintaining the viability of political parties, for example, by public funding and/or guaranteed free time in the media
- to allow parties and candidates equality of access to government-controlled media
- to ensure, through national programmes of civic education, that the population become familiar both with election procedures and issues

In addition to implementing measures, States should also take the necessary policy and institutional steps to ensure the achievement of democratic goals and the progressive strengthening of democratic traditions, for example, by establishing a neutral, impartial or balanced mechanism for the management of elections. Any such agency thereby created should,

- ensure that those responsible for the administration of the election are trained and act impartially



- ensure that coherent voting procedures are established and made known to the voting public
- ensure the registration of voters, updating of electoral rolls and balloting procedures, with the assistance of national and international observers, as appropriate
- encourage parties, candidates and the media to accept and adopt a Code of Conduct to govern the election campaign and the polling period
- ensure the integrity of the ballot through appropriate measures to prevent double and multiple voting and fraud
- ensure the integrity of the process for counting votes
- announce the election results and facilitate any transfer of authority

The principle of the secret ballot implies certain minimum conditions, ranging from the supply of booths and other voting materials, to the location of polling stations and the orderly organization of vote casting. Experience confirms that elections are more likely to be free (that is, the internationally required objective is more likely to be reached), if all major parties have monitors or poll watchers. The State should therefore ensure that,

- voters are able to cast their ballots freely, without fear or intimidation; the authorities should take such steps as are necessary to protect voters from threats or other violence
- the secrecy of the ballot is maintained
- the ballot is conducted so as to avoid fraud or other illegality, and so as to ensure its own security
- the integrity of the process is maintained, and that ballot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification

Under international law, States are obliged to respect and to ensure the human rights of all individuals within their territory and subject to their jurisdiction. This general obligation is particularly important at election times, when the exercise of certain rights is directly related to the goal of a free and fair election at which the will of the people can be expressed. Through its laws and policies, the State and its organs should therefore ensure,

- that freedom of movement, assembly, association and expression are

respected, with particular reference to the holding of political rallies and meetings

- that parties and candidates are free to communicate their views to the electorate, and that they enjoy equality of access to State and public service media, which should also provide non-partisan coverage of election campaigns
- that parties and candidates, so far as practicable, enjoy reasonable opportunities to present their electoral platform
- that parties, candidates and supporters enjoy equal security, and that the authorities take the necessary steps to prevent electoral violence

Governments, even unelected ones, also have responsibilities to the communities of which they are a part. In the interests of peaceful change and to protect the rights and freedoms of citizens, governments may therefore have the right and the obligation to limit the rights and activities of those whose conduct constitutes an incitement to violence or otherwise undermines the democratic process. In accordance with the general provisions of international law, however,

- election rights should only be subject to such restrictions of an exceptional nature which are in accordance with law and reasonably necessary in a democratic society in the interests of national security or public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others and provided they are consistent with States' obligations under international law.
- permissible restrictions on candidature, the creation and activity of political parties and campaign rights should not be applied so as to violate the principle of non-discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Finally, a free and fair electoral system must also be able to deal effectively with the different types of complaint that will inevitably arise. The principle of effectiveness of obligations and the human right to a remedy for violations require,

- that complaints and challenges in electoral matters be determined by an independent and impartial authority, such as an electoral commission or the courts, that decisions be reached promptly, within the timeframe of the election, and that procedures be open and known to the electorate and the parties.

## 5. CONCLUSION

At the beginning of this Study, the relatively cautious views of several publicists were cited, particularly in regard to the notion that international law might, or more likely might not, require either representative or democratic government. The present review of State practice and the increasingly *normative* activities of inter-governmental and non-governmental organizations require that this natural caution be reconsidered. This is a time of change, and a time, not necessarily for rejecting, but for re-evaluating traditional doctrine on certain fundamental issues in the system of international organization, including that of entitlement to represent the State.

This may not be the moment to make representative democracy a condition of membership in the society of nations, but it is certainly not too early to assert that the manner by which the will of the people is translated into representative authority has indeed become a proper subject of international law.

*Postscript: December 2005*

The developments set out and analysed in Part 1, *Further Steps along the Democracy Road*, bear out these tentative conclusions. The 'democracy clause' has become a common characteristic, in particular, of membership in regional organizations, the full implications of which for the traditional conception of sovereignty have yet to be realised.

Moreover, the notion of democratic representative government, as the product of elections genuinely reflecting the will of the people, is increasingly recognized. This, in turn, is leading to ever closer attention being paid to the 'representative' quality of electoral systems, including the manner by which votes are transformed into seats in the legislature, and thereby also into governments; to the fundamental principle of equality, considered generally and with particular reference to traditionally disadvantaged groups in society, such as women; and to a variety of forces which have an impact on the competitive ideal of elections, such as media control and money.

Clearly, the elections debate is no longer, if it ever was, a matter concerning States in transition from conflict or from authoritarian forms of government; on the contrary, it is of growing relevance to all democratic systems, now facing the internal challenges of alienation and distrust of the process. As Part 1 suggested, a challenging agenda lies ahead.

## ANNEX

### FREE AND FAIR ELECTIONS EXTRACTS FROM SELECTED INTERNATIONAL INSTRUMENTS

#### **1948 Universal Declaration of Human Rights**

##### *Article 2*

Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status...

##### *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 of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

#### **1952 Convention on the Political Rights of Women**

##### *Article 1*

Women shall be entitled to vote in all elections on equal terms with men, without any discrimination.

#### **1965 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:

...

(c) Political rights, in particular the rights to participate in elections - to vote and to stand for election - on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

(d) Other civil rights, in particular:

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;

### **1966 International Covenant on Civil and Political Rights**

#### *Article 3*

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.

#### *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.

### **1979 International Convention on the Elimination of All Forms of Discrimination against Women**

#### *Article 2*

States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women...

*Article 7*

State 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 selection 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.

**1948 American Declaration of the Rights and Duties of Man**

*Article 20*

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.

**1950 European Convention on Human Rights: Protocol 1**

*Article 3*

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

**1969 American Convention on Human Rights**

*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.

### **1981 African Charter on Human and Peoples' Rights**

#### *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.
2. Every citizen shall have the right of equal access to the public service of his country.
3. Every individual shall have the right of access to public property and services in strict equality of all persons before the law.



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Council of Europe Venice Commission	<a href="http://www.venice.coe.int">www.venice.coe.int</a>
Electoral Commissions Forum of SADC	<a href="http://www.sadcecf.org">www.sadcecf.org</a>
Electoral Institute of Southern Africa	<a href="http://www.eisa.org.za">www.eisa.org.za</a>
Global Database of Quotas for Women	<a href="http://www.quotaproject.org">www.quotaproject.org</a>
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OSCE Office for Democratic Institutions and Human Rights	<a href="http://www.osce.org/odihr">www.osce.org/odihr</a>
OSCE Office for Democratic Institutions and Human Rights - Elections	<a href="http://www.osce.org/odihr-elections">www.osce.org/odihr-elections</a>
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