# ELECTION INVESTIGATIONS GUIDEBOOK

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INTERNATIONAL FOUNDATION FOR ELECTORAL SYSTEMS
IFES

ELECTION INVESTIGATIONS

# Election Investigations Guidebook

## Standards, Techniques and Resources for Investigating Disputes in Elections (STRIDE)

International Foundation for Electoral Systems (IFES)
2020

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# ACKNOWLEDGMENTS

**For more than** thirty years, the International Foundation for Electoral Systems (IFES) has assisted courts, election management bodies, anti-corruption agencies, police, prosecutors and adjudicators to address electoral disputes and violations. We have helped with defining laws and procedures, holding hearings, managing caseflow, documenting decisions, and training staff in stakeholder institutions within a framework of internationally accepted principles. Based on this experience, we have identified two gaps that present unique challenges to adjudicators in many countries and, in many instances, undermine confidence in electoral results: first, a lack of clear definitions and approaches to implementing effective remedies to electoral disputes (a challenge we have outlined in *International Election Remedies*, John Hardin Young (ed.), American Bar Association, 2016); and second, few sources for international principles that apply to the investigation of electoral crimes and electoral complaints. Over the years, we have had many conversations with judges who must make highly political decisions in a compressed timeline on electoral claims that are not properly supported by admissible and substantiated evidence.

This guidebook is the product of our efforts to close this gap and better support our partners in election adjudication around the globe. To inform the guidebook, IFES conducted surveys and interviews, reviewed the available literature, and analyzed case law. IFES' work is guided by international principles and comparative experience, and we endeavor to make our publications as practical as possible. Accordingly, we relied on international public law to provide a framework though which to identify standards for election investigations, and then on comparative experience to identify concrete recommendations to implement these standards in practice.

As with most new areas of comparative legal research, gathering the information for a publication like Election Investigations Guidebook is not an easy task. This guidebook is the result of hundreds of hours of effort by numerous people over several years, including legal fellows who conducted research, colleagues and practitioners around the globe who provided examples and

lessons and peer reviewed recommendations, and writers and editors at IFES who helped finalize this manuscript. Over the years, so many people have worked on this book that I do not have the space needed to name them all. However, I would like to acknowledge and thank a few key individuals.

Early in the process Ena Dakanic and Emily Lippolis helped collect data, conduct research and draft sections that form the foundation of this publication. As the publication started to take form, Typhaine Roblot, Heather Szilagyi and Alexandra Brown contributed hours of time editing, researching outstanding questions, and structuring the findings in a user-friendly format. Erica Shein's editing greatly increased the clarity and thoughtfulness of the work, which was not an easy task considering the subject matter and length of this publication. Similarly, I want to thank Manuel Wally, George Carmona and Sir Hugh Williams for their thorough and thoughtful peer review and Lorenzo Córdova Vianello for providing a thought-provoking foreword that provides a practitioner's perspective to the subject and helps to frame and introduce our work.

Finally, I cannot thank enough my co-author Katherine Ellena who always challenges my assumptions, pushes my thinking on these subjects, provides great insights into our work, brings a deep interest in and enthusiasm for the subject matter and ensures that our publications are practically-focused to ensure the impact of our work on the ground.

Chad Vickery
Vice President, Global Strategy and Technical Leadership
International Foundation for Electoral Systems

# FOREWORD

**Elections are political** and social processes characterized, among other aspects, by conflict and disputes. It may seem illogical, but disputes are indeed inherent to any electoral process. To some extent this is expected to be the case. When elections are competitive, when there are guarantees of fairness in the quest for votes, and when electors can freely choose their representatives - then individual votes matter, the people's will matters, and parties and candidates will strive to show voters what sets them apart from their political competitors. Therefore, disputes and even a certain degree of non-violent conflict is inherent in elections, even or especially in democratic regimes.

"Due to its analytical breadth and hands-on approach, this *Guidebook* will be of great value to the community of electoral professionals worldwide. . . it is clear to me that this *Elections Investigations Guidebook* is a work that fills a gap that long ago needed to be filled."

In a democracy, the political disputes that occur in elections have a different nature and are processed differently from other political contexts. There are at least three key features regarding how conflict and electoral disputes are addressed in democratic contexts. In a consolidated democracy, any political conflict always starts, first and foremost, from the recognition that all electoral alternatives are legitimate, that political opponents have the right to seek power, achieve it through suffrage, and exercise it, always under the rules of a constitutional democracy. Secondly, political actors acknowledge that electoral disputes, especially those of a strictly political nature, are in the end resolved through voting; in democracies, especially in the most consolidated, all the actors that are not favored with the vote of the majority recognize their defeat and the victory of their adversary. Recognizing defeat in an election, especially when characterized by intense and fair competition, is one of the most notable displays of civic and democratic behavior.

The third feature of electoral disputes in a democracy is that when it is presumed, and then verified through exhaustive investigations, that a con-

flict goes beyond the limits of legality, disputes are dealt with based on clear rules, that are developed and known to all actors (after a process of inclusive deliberation and, ideally, consensual or sufficiently widespread support) and enforced by a competent and impartial authority. Furthermore, as a result of addressing electoral disputes according to these rules, a definitive solution is always reached within the current legal framework — even though politically it may leave some actors unsatisfied. This *Elections Investigations Guidebook* fits precisely in this key pillar of the democratic process of an election.

Built on the basis of an extensive analysis of documentary and empirical evidence, including consultation with experts, gathered over several decades, but also generated specifically for this *Guide*, IFES has delivered with this document a work that has the double attribute of being detailed and comprehensive, but also simple and accessible. This *Guidebook* brings together a vast amount of research and analysis regarding the practices and norms of a wide variety of countries in relation to the investigation processes to address and settle electoral disputes. The challenge is enormous if one considers the scant research that exists on the subject and the diversity of legal approaches and norms that abound in the matter around the world.

While addressing detailed and complex issues in this *Elections Investigations Guidebook*, IFES also decided that the breadth of the effort would not detract them from reaching out to those who can best use it, the practitioners and investigators of electoral disputes. As its name implies, this *Guidebook* offers a clear and precise map on how to conduct investigations to resolve electoral conflicts, adhering to fundamental principles that aim at the full exercise of political rights. Furthermore, as the *Guide* shows, these general principles are grounded in concrete analysis using examples of practices and regulations from a wide number of countries. Although its purpose is not to carry out a full international comparative analysis, it offers empirical and conceptual bases on this route.

Due to its analytical breadth and hands-on approach, this *Guidebook* will be of great value to the community of electoral professionals worldwide. It allows for an understanding of the nature of electoral disputes in democratic processes, and at the same time makes it easier for those in charge of coordinating or conducting investigations into legal violations or electoral disputes to have a useful tool at hand that offers evidence and pointers regarding some of the dilemmas they face in their everyday practice.

As head of the National Electoral Institute, the institutional body in charge of organizing the elections in Mexico at the federal level and coordinating voting processes at the sub-national level along with local electoral authorities, it is clear to me that *Elections Investigations Guidebook* is a work that fills a gap that long ago needed to be filled. It also makes an essential contribution to help improving practices and standards on elections investigations and electoral disputes, which will undoubtedly contribute to strengthening electoral integrity around the world.

Lorenzo Córdova Vianello
President of the National Electoral Institute, Mexico.

# HOW TO USE THIS GUIDEBOOK

## Who is it for?

This Guidebook is a tool for public officials—election management bodies, law enforcement, or other institutions—who are responsible for carrying out election investigations or fact-finding processes in politically sensitive and time restrained electoral environments.

## Why was it developed?

This Guidebook seeks to provide comparative examples of how different countries approach election investigations, and to set out a general framework and guidelines for the investigative process. The content and design are informed by more than three decades of global experience by IFES with election dispute resolution (EDR) processes. We have observed and responded to a range of challenges that are unique to election investigations or fact-finding processes. We have found that, depending on the type of electoral dispute or violation, evidence can be difficult to find, transport, and secure, and investigators may face considerable time pressure as election results cannot be delayed indefinitely. In some countries, it may be unclear who is responsible for fact finding and conducting investigations, or investigators may lack experience with the electoral process and its unique challenges. Fact-finding processes for electoral complaints can also require concurrent investigation of both criminal and administrative violations, adding an additional layer of complexity and required expertise.

There are many different models for EDR around the world, and therefore no "one-size-fits-all" approach to how complaints, disputes, and violations should be investigated and adjudicated. There are also variations in legal traditions, institutional structures, procedural rules, and codification of different types of violations across countries that will influence how investigations are implemented in practice. Hence, this Guidebook does not purport to set out one approach; rather, it articulates a set of international standards and good practices for public officials to consider. Because comparative information

on election investigations has not to date been readily available, we have also presented a variety of country examples to illuminate the standards in this Guidebook. Some are presented to emphasize good practices, others simply as an illustration of how some jurisdictions have approached election investigations to date.

## How was it developed?

The process of developing this Guidebook is outlined in more detail in the introductory section. It involved an initial literature review of available texts on investigations, engagement with relevant experts, meetings with judges and lawyers, a global survey, workshop discussions, and multiple rounds of peer review.

## What is the basis of the Guidebook?

The Guidebook is framed around General Comment 31 to the *International Covenant on Civil and Political Rights* (ICCPR): "Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies." The Guidebook considers these four key elements to be the basic investigative principles and provides further detail for applying them to electoral allegations specifically. Discussion of each principle focuses primarily on the role of investigators but also touches on the tasks of other stakeholders that may impact the principle and the investigator's role in the broader process of election dispute resolution and prosecution.

## How is the Guidebook structured?

The Guidebook is divided into the following sections:

### › Introduction

This section outlines the background to and development of the Election Investigations Guidebook and introduces the topic of election investigations within the wider context of election dispute resolution and prosecution. It also introduces key international principles that govern election investigations.

### › Stages of the Investigation Process

This section provides an overview of the investigations process as it pertains to different types of elections disputes, violations, and offenses. This section also touches on wider elements of election dispute resolution to situate the investigations process in a broader context.

### › Principle 1: Ensuring Investigations Are Undertaken and Completed Promptly

This section examines the principle of prompt investigation and the different elements that support its realization. This includes classifying the type of claim at issue, conducting a preliminary assessment, categorizing complaints according to urgency and potential impact, and having clear protocols in place for decision-making and investigative processes.

### › Principle 2: Ensuring Investigations Are Thorough

This section examines the principle of thorough investigation and the different elements that support its realization. A thorough investigation requires that types of acceptable evidence are pre-determined; that evidence is substantiated and corroborated; that exculpatory evidence (evidence favorable to the defendant) is sought; that the standard of evidence to be used is clear; that search and seizure processes are followed; that interviews are planned, conducted, and documented properly; that evidence is analyzed and presented appropriately; and that adequate document retention and data protection strategies are implemented.

### › Principle 3: Ensuring Investigations Are Effective

This section examines the principle of effective investigation and the different elements that support its reali-

zation. Effective investigation requires clear mandates; competent and professional investigators; systems of accountability; maintenance of a proper chain of evidence; and the ability to act against bad faith, malicious, or negligent complaints.

### › Principle 4: Ensuring Investigations Are Undertaken by Independent and Impartial Bodies

This section examines the principle of independence and impartiality and the different elements that support its realization. Independence and impartiality require that investigators and the investigation process be fair and objective, avoid conflicts of interest, and operate with integrity and incorruptibility.

### › Index

An index is provided to help users navigate the Guidebook and use it as a reference tool.

# INTRODUCTION

**THE EFFECTIVE RESOLUTION** of electoral complaints is integral for the integrity and legitimacy of an election. If not handled properly, election claims and disputes can destabilize governments, undermine public trust, and lead to violence. However, the credibility of the electoral process can be strengthened if the laws and procedures that govern dispute resolution are coherent, enforceable, and provide access to effective remedies.

In the 2011 *Guidelines for Understanding, Adjudicating, and Resolving Disputes in Elections* (GUARDE), IFES articulated standards and best practices for adjudicating electoral complaints.[1] During the development of GUARDE, IFES conducted research on adjudication-related legal processes, revealing that many adjudication bodies are asked to make decisions based on incomplete claims that lack corroborating or substantive evidence.

Insufficient admissible evidence is a particularly vexing challenge that adjudicators face when working to resolve disputes or to sanction violations in elections. For this specific dispute type, courts may be required to determine whether certain irregularities had an outcome-determinative impact on election results. Similarly, for certain election offenses, such as vote buying, the standard of evidence required to initiate prosecution may be high and, depending on how the offense is codified, different types of evidence may be required to prove the act, intent, and impact on the criminal burden of proof—beyond a reasonable doubt.

Another widespread problem affecting frameworks for electoral dispute resolution is a lack of predefined and practicable fact-finding and adjudication procedures. In IFES' experience, most countries seem to conform to one of three different scenarios:

1| Legal and procedural frameworks for elections incorporate a country's civil procedure framework wholesale, and the due process guarantees

1 *See* IFES, GUIDELINES FOR UNDERSTANDING, ADJUDICATING, AND RESOLVING DISPUTES IN ELECTIONS (GUARDE) (Chad Vickery ed., 2011), https://www.ifes.org/sites/default/files/guarde_final_publication_0.pdf [hereinafter GUARDE].

that are found within this framework are often impossible to reconcile with compressed electoral timeframes;[2]

2| A specific electoral framework is adopted (rather than using a civil procedure), which sets out rudimentary due process guarantees—such as the right to a hearing or the right to submit written answers—but which lacks rules on the admissibility of evidence and/or the burden and/or standard of proof;[3] or

3| Both courts and electoral management bodies (EMBs) must follow the legislation on administrative procedures.[4]

Another common problem encountered in the field relates to the fact that legal frameworks often mandate EMBs to investigate violations, although many are neither trained nor appropriately staffed to conduct professional investigations. Often, EMBs only involve law enforcement—which would be best equipped to conduct these investigations—if the alleged conduct is *criminal* rather than *administrative*, even if the alleged maladministration had or could have had an impact on the election outcome. If criminal conduct is alleged and a law enforcement body initiates a criminal investigation, the due process guarantees and the high required evidence standards (beyond a reasonable doubt) can thwart a timely outcome and limit the ability of election dispute resolution bodies to take criminal convictions into account when determining remedies.

Some frameworks that vest EMBs with this mandate stop short of endowing them with the requisite judicial powers to effectively conduct investigations, such as the powers to subpoena documents and witnesses and to hold non-compliant parties in contempt. Such framework incoherence exposes EMBs to unjustified criticism that they abdicate their investigative mandates. An example of an EMB that is vested with a fairly complete array of investiga-

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2 *Compare* Libyan Elect. L. art. 29, No. 10/2014 (imposing 48–72 hour timeframes) with Libyan Civ. Code art. 752–53 (granting ample time for cross-motion and adjournment windows).

3 For instance, most Francophone African electoral frameworks; see, e.g., Code électoral [Electoral Code], Feb. 7, 1992, No. 2012-01 (Sen.); Republique de Cote D'Ivoire, Compliation de lois Portant Composition, Organisation, Attributions et Fonctionnement de la Commission Electorale Independante (CEI) (2004); Const. art. 49, 81 (Benin); Const. art. 104 (Togo); Const. art. 116 (Madag.).

4 This applies in most post-Soviet states.

tive powers is Senegal's Autonomous National Electoral Commission (CENA), whose statute arms it with civil remedies, such as injunction, substitution, and order for specific performance.

The extent to which legal frameworks are prescriptive about what investigation procedures are to be followed varies widely, including cases in which alleged conduct is both criminal and potentially outcome-determinative. For example, Armenia's election code minutely prescribes the steps to be taken to investigate impostor voting, including the process for a joint EMB-police investigation.[5]

Given this range of challenges, IFES conducted an initial literature review of available texts on investigations and found scant comparative documentation on election investigations. This finding underpinned IFES' initiative to produce a user-friendly publication for practitioners (including development assistance providers, prosecutors, members of the judicial system, and election commissions). Bhutan and Canada are specifically cited throughout this volume because they represent two of the very few countries that have put in place guidelines and procedures specific to election investigations.

IFES engaged with a number of relevant experts in creating this Guidebook, including prosecutors from the United States Department of Justice and the Special Prosecutor for Electoral Crimes in the Office of the Attorney General of Mexico. In addition, IFES staff held meetings with judges and lawyers who

5 Council, European Commission for Democracy Through Law (Venice Commission), CDL-REF(2018)054, Armenia: Electoral Code art. 48(17) (May 4, 2018) ("When examining applications regarding voting instead of a person being absent from the Republic of Armenia, the district electoral commission shall: 1) verify — through Electronic Border Management Information System (hereinafter referred to as "EBMIS") used by Border Guard Troops of the National Security Service of the Republic of Armenia adjunct to the Government of the Republic of Armenia — information on the fact of being absent from the Republic of Armenia of the person referred to in the application. Where the data available in the EBMIS reveal that the person, with regard to whom the application has been submitted, has crossed the border of the Republic of Armenia after the start of the voting, the application for this person shall be deemed groundless, and the administrative proceedings with respect to that part shall be dismissed. Where the data available in the EBMIS reveal that the person, with regard to whom the application has been submitted, has not crossed the border of the Republic of Armenia or has last crossed the border when entering the territory of the Republic of Armenia, the application for this person shall be deemed groundless, and the administrative proceedings with respect to that part shall be dismissed; (2) establish whether the person, with regard to whom the application has been submitted, has been registered by means of technical equipment; (3) verify also, in case of an elector registered by means of technical equipment and having an identification card, whether the fingerprint provided in the course of registration matches the fingerprint of that elector available in the electronic database of identification cards maintained by the Police. Upon the request of the district electoral commission, the Police, the National Security Service and, where necessary, other bodies may be engaged in the process of organising examination of applications regarding voting instead of another person. Where there is no sufficient evidence proving the participation in the voting by the given person, solely for rendering a decision based on the election results, it shall be deemed, applying the principle of presumption of reliability, that voting instead of another person has taken place. All the applications shall also be forwarded to the relevant law enforcement body, regardless of the process of examination of the application in the district electoral commission.").

have experience with the U.S. election complaints adjudication and dispute resolution process. To provide additional primary source data, the IFES team developed survey questions for assessing the quality of election investigative processes in select countries.

Initially, the research focused on three main areas: (1) rights-based standards; (2) principles for investigators; and (3) successful investigative processes. Drawing on these three research areas, IFES convened a roundtable discussion with senior election law experts and investigators in order to identify key aspects of the electoral investigation process and to create an outline for the publication that would be developed under the project. This was followed by an IFES panel at the American Bar Association's International Law Section Meeting that focused on "Election Crime and Punishment: The Search for International Standards for Investigations and Prosecution in Election Cases."

Three main findings emerged from these discussions:

1| *Investigators must be perceived to be independent and impartial.* Electoral claims are threatened by both real and perceived bias. Perceptions of bias arise because of the political nature of election cases and the very real possibility that political actors might attempt to unduly influence investigations. This is particularly relevant for investigators who are accountable to the executive branch. The risk of selective adjudication or abuses of administrative resources is even higher when investigators from the executive branch handle allegations of electoral crimes or violations in which the executive branch may be a defendant.

2| *In order to meet tight deadlines for investigation and resolution of allegations of electoral crimes and violations, states should develop and implement streamlined, accelerated systems that protect the due process rights of accused parties.* For this purpose, prior to the election, states must establish and make public an effective triage process that ensures that investigators can pursue legitimate claims and quickly dismiss frivolous or clearly unfounded claims.

3| *As allegations of electoral crimes and violations emerge, investigators must consider what types of remedies are available for the plaintiffs and the state.* Determining the seriousness of the alleged violations,

the effect on the results, and the likely remedy (criminal or administrative) *prior to* beginning an investigation would guide investigators in determining the type of investigation, appropriate standard of evidence, burden of proof, timeline for investigation, and applicable due process rights.

Based on the patterns that emerged during desk research, expert discussions, and survey response analysis, the IFES team refined the initial publication outline to reflect the United Nations Human Rights Committee's General Comment 31 on the *International Covenant on Civil and Political Rights* (ICCPR). General Comment 31 specifically references administrative violations but also provides a framework for considering investigations into all types of allegations. The general principles identified in General Comment 31 should apply regardless of the body responsible for investigating the complaint, which may vary depending on the violation type.

> Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations *promptly, thoroughly* and *effectively* through independent and impartial bodies.
>
> *ICCPR General Comment 31*

The principle of prompt investigation outlined in General Comment 31 is particularly important in election contexts, whose processes and results are time-bound. Furthermore, the evidence obtained during election investigations could be time-sensitive or subject to destruction after an election in accordance with statutory guidelines, and the impunity for electoral offenses could linger from one electoral cycle to the next and harm the democratic process—if not dealt with in a timely manner. The principle of thorough investigation is important for ensuring that any action taken in response to a dispute or allegation is based on merits substantiated by sound evidence. The principle of effective investigation ties directly to the fact that individuals must have access to effective remedies to vindicate their political rights. The right to an effective remedy can be undermined if the investigation process into an alleged violation is not effective. Finally, the principle that stipulates that investigations must be undertaken by independent and impartial bodies is fundamental for the legitimacy of the investigation process and outcome

### A note on election audits:

Election audits are increasingly used as a means of settling disputes about electoral results. The terms "audit" and "recount" are often used interchangeably, but they are not the same thing. A recount is a process by which ballots in an electoral contest are tallied again. Unlike a recount, an audit is undertaken to investigate alleged fraud or malpractice. An audit may include a recount of the votes, but it also involves other aspects of an investigation into allegations of fraud. While an election audit is a type of investigative process, it is not covered in detail in this Guidebook.

A detailed discussion of the principles that should apply to election audits can be found in "Election Audits: International Principles that Protect Election Integrity," by the International Foundation for Electoral Systems (IFES) and Democracy International (DI) (2015), available at https://www.ifes.org/sites/default/files/2015_ifes_di_election_audit_white_paper_0.pdf

and for the avoidance of any perceptions of bias.

As mentioned at the outset of this Guidebook, there is no "one-size-fits-all" approach to how electoral complaints should be investigated and adjudicated, and there are many variations in legal traditions (including civil versus common law), institutional structures, procedural rules, and codification of different types of violations across countries. This Guidebook does not endeavor to present a model or models that all types of systems should adhere to – whether they are in large, well-resourced countries or smaller countries facing resource constraints. Rather, we offer a set of high-level standards to inform election investigations in practice, whatever system or structure exists in a particular country.

# CROSS-CUTTING CONSIDERATIONS

## Common Law versus Civil Law Systems

**AS WITH ANY** field of law, there are differences in the application of principle and procedure between civil law and common law systems. This includes general issues, such as the treatment of evidence, as well as specific rules, such as privilege against self-incrimination in common law criminal justice systems. IFES works globally in both common law and civil law systems, and has found that generally the challenges or weaknesses in both systems (around, for example, access to evidence and tight deadlines for adjudication) are similar, despite different legal traditions. In addition, the international standards that form the basis of this Guidebook apply equally to both systems. Hence, the focus of this Guidebook is not to develop distinct approaches for different systems, but to discuss broad standards that apply regardless of the system and can be tailored for each. Where there are unique considerations, we have endeavored to highlight them. We have also provided comparative examples from both civil law and common law countries.

## Civil versus Criminal Jurisdiction

There are many different types of complaints, disputes and violations that can arise during an election. For example: disputes between election contestants or between election contestants and election officials; administrative violations or malpractice related to the arrangements, procedures and mechanisms of election administration; violations against a code of ethics or code of conduct; results disputes or petitions; and election offenses or crimes. This means that EDR mechanisms must be both corrective and punitive: *corrective*, because they annul or modify the irregular act, and, as the case may be, protect or restore the enjoyment of electoral rights; and *punitive*, to punish the perpetrator or the entity or person responsible for the irregular act.

Whether a complaint or violation is civil, administrative, or criminal in nature will depend on the laws of the specific country. IFES has found in some countries that the legal framework is not clear as to whether certain election

offenses are administrative or criminal in nature (which naturally has implications as to what procedure might apply). In addition, many jurisdictions do not explicitly clarify the existence of concurrent civil/administrative, and criminal jurisdiction for certain types of acts (for example, vote buying) that would allow for both civil/administrative and criminal remedies to apply. This Guidebook does not go into detail on this distinction, given the need for brevity and the overarching goal of providing broad standards, but does note distinctions between administrative and criminal procedure (and how this impacts investigations) and give examples of each. Given the majority of election disputes and petitions are civil or administrative (versus criminal, which is generally reserved for serious election offenses), much of the discussion in this Guidebook focuses on civil and administrative procedure and practice.

## Perceived Structural Conflicts of Interest

Because the gathering of evidence in election cases can be extremely difficult, the role of the EMB can be of critical importance. In some cases, the EMB will be the only party in a position to investigate irregularities or to determine the impact of the irregularity on an election result. In Australia, for example, the EMB has a formal and permanent role as a source of information and expertise for challenges to election results. In the United Kingdom, the Electoral Commission recommended that it be given an investigatory role in election petitions since in many cases it is difficult for individual plaintiffs to investigate effectively, and since election petitions raise issues of interest to the wider public, it is in the public interest that all relevant evidence comes before an adjudicator.

IFES has previously noted that EMBs should generally play a role in election investigations because they are better equipped than police in terms of technical knowledge of election administration and access to the relevant evidence. However, this means that in many instances an EMB will be investigating allegations related to its own personnel and actions (or inactions), and this could result in an actual or perceived conflict of interest. Given the important role of an EMB in election investigations, for the purposes of this Guidebook our focus is on mechanisms to reduce or remove potential conflicts. For example, as long as EMBs process and investigate claims in an unbiased manner irrespective of their source, and as long as a right of appeal is in place, any actual or perceived conflict can be mitigated.

# STAGES OF THE INVESTIGATION PROCESS

**THE INVESTIGATION PROCESS** represents just one step in the broader election dispute resolution (EDR) process. Each step of this broader process is important for the effectiveness of the system and the overall outcome. This EDR process is illustrated in the figure below.

*Figure 1: Basic scheme of an election dispute resolution process:*

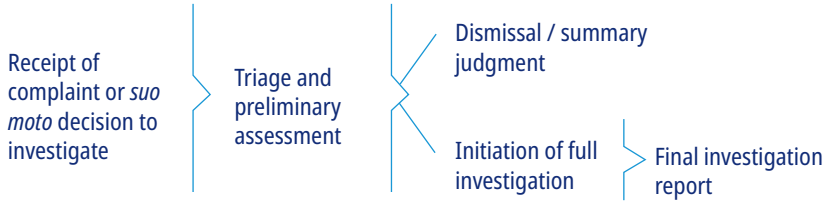

According to the *United Nations Development Programme's (UNDP) Investigation Guidelines*, the investigative process contains three parts: assessment, investigation, and reporting.[6] These three stages offer a helpful framework for conducting a thorough investigation.

First, an assessment involves evaluating initial information to determine whether further investigation is warranted—equivalent to the triage process introduced above. Second, the investigation itself encompasses "the process of planning and conducting appropriate lines of inquiry to obtain the evi-

6 *See* U.N. Dev. Programme Office of Audit & Investigations, Investigation Guidelines ¶ 8 (2012), http://www.undp.org/content/dam/undp/documents/about/transparencydocs/OAI_Investigations_Guidelines.pdf [hereinafter UNDP Investigation Guidelines 2012].

dence required to objectively determine the factual basis of allegations."[7] This includes obtaining documents and other information, interviewing witnesses and recording their testimony, evaluating the evidence, and developing findings and recommendations. Finally, in the reporting stage, investigators deliver their findings and conclusions to relevant authorities. These stages are encapsulated in the figure below and are further detailed in subsequent sections.

*Figure 2: Basic scheme of an election investigation*




## Receipt of Complaint

As illustrated in the graphic above, an investigation may be triggered by the receipt of a complaint by a stakeholder with legal standing, or an authorized institution may become aware of a potential violation and make a *suo motu* decision (taking action on its own accord or own motion) to investigate the issues without the need for a complaint being filed. Both triggers for investigation are important.

The level of formality required in the complaint submission process varies from country to country. Some countries require specific forms to be submitted, while others accept complaints in almost any form. Some investigative or election dispute resolution bodies require that a written complaint be completed on a standardized form, while others allow complaints to be filed by email, through a website, or by phone. In **Sri Lanka**, the Election Commission accepted complaints filed anonymously for the 2015 elections due to the lack of trust and fear of retaliation that has persisted since the civil war. While this provision protects complainants and allows legitimate complaints to be filed without fear, the investigators could face potential challenges in

7 Id. ¶ 8.2.

collecting further information and evidence if sufficient detail is not provided in the initial complaint.

In another example, the **Australian** Electoral Commission's complaint management policy clearly states that a complaint may be submitted anonymously or using a pseudonym but that the resulting investigation and response may necessarily be limited.[8] It is important to note that, even where a complaint cannot be filed anonymously, the investigator can keep the name and information of the complainant confidential in order to ensure his or her protection from retaliation, especially in countries in which election violence is common.[9] Investigation bodies may refrain from sharing the name of the complainant when notifying the respondent or when releasing information about the case to the media.[10] For example, the Election Complaints Commission (ECC) in **Afghanistan** blacked out the names of complainants when publishing its decisions during the 2010 and 2014 elections.

To ensure effective notice and reduce the likelihood of immediate complaint dismissal due to lack of information, EDR bodies should develop uniform standards for the submission of complaints. Laws and regulations often lay out requirements for filing, including the use of a standardized complaint form, the exact time, place, and narrative description of the alleged violation, the contact information for the complainant, the witnesses, the on-site statement by the EMB representative and/or respondent if known, the remedy(ies) sought, the alleged impact on election processes and outcomes, the legal or regulatory provision allegedly violated, and the itemization of admissible evidence submitted in support of the complaint.[11]

Standard complaint forms, either physical or online, also offer complainants the guidance on the elements required for filing.[12] Developing filing standards that are clear and accessible to all election stakeholders would assist investi-

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8 Australian Electoral Comm'n, Complaints Management Policy, https://www.aec.gov.au/about_aec/publications/policy/complaints-management.htm (last visited May 26, 2020) [hereinafter Australian Election Complaints Management Policy].

9 Id.

10 Id.

11 Law No. 1381-XII of 1997 (Electoral Code of the Republic of Moldova), Monitorul Oficial al R.Moldova No. 81/667 of July 12, 1997, art. 65–68 (Moldova); Election Comm'n of Liberia, Complaints Regulations ¶ 6 (2005); Haiti Const. art. 183 (2005); Law No. 112 of 2014 (Election Law), هیلدع ترازو No. 15/5/1392 of Aug. 6, 2014, art. 62–68 (Afg.).

12 Sri Lanka, Election Commission, Complaint Form (on file with IFES); Canada, Commissioner of Canada Election, When Should I Complain, Online Forms, https://www.cef-cce.ca/content.asp?section=comp&dir=faq&document=index&lang=e (last visited May 27, 2020).

gative bodies in processing complaints impartially and effectively. However, standardized filing requirements should not be used to frustrate legitimate complaints simply because of procedural inadequacies. Detailed complaint forms should merely enable investigators to independently corroborate alleged facts, without imposing procedural barriers to access remedies.

Some countries require investigative bodies to notify complainants of any procedural inadequacies found in their submitted complaints in order to allow for correction—and this represents a good practice in terms of procedural justice. It allows complainants to rectify the issue before complaints are dismissed. In **Myanmar**, the 2015 *Election Dispute Resolution Manual* stated that the Commission "may also decide to allow the objector to supplement the petition within a reasonable period of time if the objection is deficient or has a procedural defect."[13] Because the voters who are not familiar with the complaints process may file electoral complaints, the opportunity to correct, complete, or amend can inoculate substantively legitimate complaints against summary dismissal on procedural grounds. In **Indonesia,** the Constitutional Court is responsible for hearing complaints regarding the validity of presidential elections. If a complaint is found to be incomplete, it is sent back to the complainant, who then has 24 hours to rectify procedural deficiencies.[14]

In *Inkatha Freedom Party v. Independent Electoral Commission*, the **South African** Electoral Court held that the Independent Electoral Commission failed in its duty to investigate the factual basis of a complaint that was deemed material to the election result, per the Electoral Code of Conduct.[15] The Commission was ordered to ask the complainant to submit missing materials or information that would aid the investigation.[16] Given the reduced timeframe

13 Election Dispute Resolution Manual, 2015 General Election, Union Election Comm' of Myanmar 25 (2015).

14 Regulation No. 04/PMK/2004, art. 6 (Indon.) (stating that completeness of a complaint means "administrative completeness").

15 Electoral Commission Act 51 of 1996 § 65(3) (S. Afr.).

16 *Inkatha Freedom Party v. Independent Electoral Comm'n* 2009 (1) ZAEC 3 (S. Afr.) (outlining that Section 65(3) of the Electoral Code of Conduct stipulates that, in considering and deciding the objection, the commission may: "(a) investigate the factual basis of the objection; (b) afford interested parties an opportunity to make written or verbal submissions; (c) call for written or verbal submissions from other persons or parties; (d) call upon the objecting party to submit further information or arguments in writing or verbally; and (e) conduct a hearing on the objection"); *see* Electoral Commission Act 51 of 1996 § 65(3) (S. Afr.).

for filing an objection,[17] the Court found that the complainant might not have sufficient time to gather or access all potentially available evidence and, therefore, the Commission was obligated to contact the complainant for further information as part of the triage process.[18]

The **Armenian** framework offers protections against summary dismissal on procedural grounds when a case shows substantive merits:

> PROHIBITION OF ABUSE OF FORMAL REQUIREMENTS: In carrying out administrative action, administrative bodies shall be prohibited from encumbering persons with obligations or from refusing to confer certain rights solely for the purpose of observing formal requirements, where the obligations imposed on them have been discharged in substance.
>
> ELIMINATION OF ERRORS IN THE FILE RELATED TO ADMINISTRATIVE PROCEEDINGS: 1. If errors, deletions, scratch-outs, misprints are found in the documents submitted by the participants of the proceedings, the administrative body shall draw the participants' attention to the documents with the intent of correcting them, or, the administrative body itself shall correct patent errors and typos of submitted documents in the presence of the participants of the proceedings. The administrative body shall not have the right to refuse receiving such documents solely on the ground that they contain such errors, deletions, scratch-outs or misprints. 2. The provisions of part 1 of this Article do not apply to the correction of such errors, deletions, scratch-outs, misprints or elimination of other documentary defects, if the right to make corrections is reserved by law to the bodies that adopted or issued the documents.[19]

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17 *See* Electoral Commission Act 51 of 1996 § 65(1) (S. Afr.) (section 65(1) requires that objections must be submitted to the Independent Electoral Commission by 5:00 pm on the second day after polling day; in addition, complaints to the Electoral Court, which acts as the final court of appeal, must be submitted within 48 hours of the announcement of results).

18 *Inkatha Freedom Party v. Independent Electoral Comm'n* 2009 (1) ZAEC 3 at 10–11 (S. Afr.) (stating that the complaint lacked sufficient detail—namely affidavits from witnesses—to substantiate an objection in a by-election result in KwaZulu-Natal. In this case, the winning candidate gained only three votes over his opponent, and the objecting party claimed that IEC officials intimidated voters at the poll).

19 L. Rep. Arm. on Fundamentals of Admin. Action & Admin. Proceedings art. 5, 41 (2004).

As urged by the *Uniform Guidelines for Investigation*, investigative bodies should "acknowledge receipt of all complaints"[20] whenever possible. Proper receipt of complaints is integral to the triage process. A thorough and detailed record of complaints can improve efficiency in both the preliminary assessment of claims and the full investigation. In **Canada**, the Commissioner's office registers all complaints on an initial report form, regardless of the format used to submit the claim.[21] EDR bodies should ensure that investigators accept all complaints that meet initial requirements and measures should be instituted to discipline investigators if they fail to do so. In **Pakistan**, a complainant may refer a matter to the Election Commission Secretariat if officials within the Election Commission Registrar fail to register a complaint or violation.[22] In its regulations, the **Moldovan** Central Election Commission explains that it records complaints, including the date and time of receipt, in a special register and assigns them with registration numbers.[23]

## Triage and Preliminary Assessment

When an electoral claim or allegation is received by an adjudicatory or investigative body, the first step in investigating the claim should be to determine which body has jurisdiction to adjudicate the claim or, if this is unclear, which forum is best equipped to handle it. Depending on whether the preliminary assessment determines that an investigative body has jurisdiction to investigate a particular claim or not, this body may begin its investigation, dismiss the case for lack of jurisdiction with notice and explanation to the claimant, or refer the investigation to another the appropriate institution.

The question of jurisdiction may be complicated if alleged violations are both administrative and criminal in nature. The EMB would need to refer the complaint to the law enforcement body responsible for the criminal investigation but also to conduct its own fact-finding process to decide whether to

20 Conference of International Investigators, Uniform Principles and Guidelines for Investigators ¶ 28 (2009), http://www.conf-int-investigators.org/wp-content/uploads/2015/05/CII-Uniform-Principles-and-Guidelines-for-Investigations_2ed-2009.pdf.

21 Comm'r of Canada Elections, Ch. 3 Preliminary Assessment of Alleged Infractions, in Investigators' Manual 1 (2004) [hereinafter Canadian Investigators' Manual Ch. 3].

22 Islamic Republic of Pakistan, Handbook on the ECP Election Complaints Process 8 (2013) (unpublished manuscript) (on file with IFES) [hereinafter Handbook on the ECP Election Complaints Process].

23 Law No. 1381-XII of 1997 (Electoral Code of the Republic of Moldova), Monitorul Oficial al R.Moldova No. 81/667 of July 12, 1997, art. 65–68 (Moldova).

award a more time-bound electoral remedy for the administrative aspect of the violation. In addition, a violation may also potentially be outcome-determinative, which adds further complexity. In some countries, disputes about results that involve the impact of alleged criminal conduct on election outcomes have resulted in highly controversial dismissals on jurisdictional grounds, especially where election courts lack criminal jurisdiction. In **Guinea**, for instance, the courts dismissed complaints with *prima facie* impact on election outcomes because appellants alleged criminal conduct that was outside the jurisdiction of the respective courts.[24] Ideally, EDR frameworks should expressly require that adjudicators take jurisdiction of (and investigate) allegations of any outcome-determinative conduct—regardless of whether it is criminal or not. This does not mean that civil and criminal jurisdiction should be merged but that any court that has authority to hear election petitions should also have the ability to consider whether certain alleged conduct impacted on the outcome of an election (without first requiring a criminal conviction and without precluding subsequent criminal prosecution).

If the investigative body decides to begin an investigation, the *Uniform Guidelines for Investigation* stipulate that a complaint must then be evaluated "to determine its credibility, materiality, and verifiability" and, ultimately, to decide whether there is a legitimate basis for a full investigation.[25] Due to the unique nature of election complaints, investigators must make their decisions in a timely fashion and in accordance with the rules, policies, and procedures that govern the electoral process.[26] For instance, **Bhutanese** rules and regulations lay out the criteria for a well-pleaded complaint,[27] stipulating that an election complaint shall only be accepted if a *prima facie* case can be established in line with the election law.[28] As such, the "main objective" of a review is "to filter those complaints with no basis or substance."[29]

International human rights tribunals, such as the European Court of Human Rights, often use the "preliminary assessment method" to filter cases. *Protocol*

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24 *See* EUEOM, Final Report: Guinea 8 (2013), http://www.eods.eu/library/FR%20GUINEA%2020.01.2014_fr.pdf.

25 Conference of International Investigators, Uniform Guidelines for Investigations ¶ 30 (2009), http://www.un.org/Depts/oios/investigation_manual/ugi.pdf [hereinafter Uniform Guidelines 2009].

26 GUARDE, supra note 1, at 50–57.

27 Election Comm'n of Bhutan, Election Dispute Settlement Manual ¶¶ 2.2–2.3 (2013), https://www.ecb.bt/wp-content/uploads/2013/04/ElectionDisputeSettlementManual2013.pdf [hereinafter Bhutan Election Dispute Settlement Manual].

28 Election Comm'n of Bhutan, Election Dispute Settlement Rules and Regulations ¶ 10.1.1 (2013), https://www.ecb.bt/Rules/Disputeeng.pdf [hereinafter Bhutan Election Dispute Settlement Rules and Regulations].

29 *Id*. ¶ 10.

*14* of the European Convention proposes to further improve the efficiency of adjudicators by breaking complaints into two categories. The first category concerns cases that are unlikely to succeed due to lack of substance or failure to state a claim. While the process of filtering out complaints that have no basis or substance is important, it is not a justification for dismissing cases purely on formalistic grounds (e.g., dismissing complaints based on a mistake in filling out a complaint form). This issue is further discussed below. The second category captures cases that are similar to the cases brought previously against the same member state. Furthermore, the protocol also proposes that cases that are "manifestly ill-founded" or in which an applicant has not suffered a "significant disadvantage" should not be admitted.[30]

Elections **Canada** confers the authority to complete preliminary assessments of complaints to the Counsel to the Commissioner of Canada Elections with assistance from the Chief Investigator.[31] In particular, the Counsel is responsible for assessing all relevant circumstances, culminating in a recommendation to the Commissioner to initiate, continue, or terminate an investigation.[32] The Chief Investigator adds to the Counsel's recommendation by reporting on any significant trends found across complaints and by evaluating the possible avenues of investigation and the likely outcomes for specific cases. The Commissioner is then authorized to determine whether or not to pursue investigation, taking into consideration the recommendations of the Counsel and the Chief Investigator.[33]

According to the process used in Canada, investigators should consider the following criteria when recommending a full investigation:

- ✓ Reasonable cause is shown for the commission of violations that have (or could have) impacted election processes and/or outcomes;
- ✓ Reasonable grounds exist to show facts that can be verified or corroborated through further investigation efforts, particularly evidence collection;

30 Protocol No. 14 to the Convention for Human Rights and Fundamental Freedoms, Amending the Control System of the Convention art. 12, opened for signature May 13, 2004, C.E.T.S. No. 194 (effective June 1, 2010).

31 *See* Canadian Investigators' Manual Ch. 3, *supra* note 21.

32 *Id.*; *see also* Comm'r of Canada Elections, *Ch. 4 Investigation Policy,* in Investigators' Manual 1–33 (2004) [hereinafter Canadian Investigators' Manual Ch. 4].

33 Canadian Investigators' Manual Ch. 4, *supra* note 21.

- ✓ A complaint appears to present a *prima facie* claim and does not warrant additional investigation;
- ✓ The factual circumstances and current environment justify further action;
- ✓ Further action is in the public interest; and
- ✓ The statute of limitations for filing complaints has not expired.[34]

If considering a formal investigation, a preliminary assessment report could include the purpose of any proposed investigation, the scope and focus of various phases, and the steps of the proposed investigation or inquiry. It could also provide preliminary understanding of the evidence collected, the names of individuals to be interviewed, and any other appropriate follow-up measures that could be considered in deciding how to address each specific alleged offense.[35]

### Burden of Proof

The burden of proof refers to the party responsible for proving facts or issues in a given case. As discussed in IFES' GUARDE, the burden of proof generally lies with the complainant for administrative and civil cases and with the prosecutor for criminal cases.[36] However, the burden of proof could be appropriately redistributed in some election cases. As described in GUARDE, petitioners might not have access to evidence that would prove the validity of the complaint. For example, an election management body has access to evidence and information that a losing candidate who has chosen to dispute the result may not have.[37]

During proceedings, the adjudicator may decide to transfer the obligation to prove a fact or an issue from one party to the other party, which is known as shifting the burden of proof. This shift takes place when certain burdens have been met, meaning

34 *See* Canadian Investigators' Manual Ch. 3, *supra* note 21, at 1–54.

35 *Id.* at 5.

36 GUARDE, *supra* note 1, at 60 ("For election challenges, the burden will generally fall on the persons challenging the outcome of the election or alleging misconduct on the part of another. This structure implies that there is a presumption of regularity of the part of officials and official actions. As the party asserting that some aspect of the election should be overturned, the petitioner can reasonably be expected to bring forward evidence to prove the assertion. Requiring the challenged party to affirmatively prove that no misconduct took place or no irregularity occurred would serve as an invitation to losing candidates or parties to bring challenges as a form of harassment.").

37 *Id.*

that an individual who bears the initial burden of proof is able to prove a particular fact or issue. The petitioner should provide substantial evidence to justify shifting the burden to the respondent in order to rebut (or disprove) the claim instead. This dilemma was highlighted in the 2017 Kenya Supreme Court judgment for *Raila Amolo Odinga & Another v. Independent Electoral Commission & 2 Others*. The Kenya decision led to the cancellation of the election results of the 2017 presidential election.[38] The Supreme Court was satisfied that the petitioner—the losing presidential candidate Raila Odinga—had discharged the burden of proof to a sufficient degree so that the burden shifted to the Independent Electoral and Boundaries Commission (IEBC) to prove that the election was conducted in accordance with the laws and rules in place. The court further ruled that the IEBC had not discharged this burden in its responses to the Court. The *Raila* case is also interesting because the Court, acting in the first instance, undertook an investigative process itself by way of a scrutiny of sample electoral materials conducted by the court registrar. The Court relied significantly on the results of this scrutiny as part of its final judgment.

The burden of proof doctrine is approached differently depending on whether the legal system is inquisitional (civil law) or adversarial (common law). In an inquisitional proceeding, both parties to the action have a duty to cooperate in the fact-finding process that is conducted by the adjudicator. In an adversarial proceeding, the importance of which party has the burden of proof is pronounced due to the fact that most plaintiffs (candidates, voters, and parties) do not have full access to the evidence they need to prove the claims made in their complaints.

Regardless of the legal system, the idea of fundamental fairness must be adhered to at all times when determining who has the burden to prove a specific fact or claim and how this evidence is produced for the proceedings. Due to the complex and political nature of election-related cases, the process by which the burden of proof is allocated to parties must be clearly defined well in advance of when cases are filed and the distribution of the burden between the parties must be equitable without requiring one party to bear the entire weight of proof when a *prime facie* case is presented to the adjudicator.

38 Raila Amolo Odinga v. Independent Electoral Commission (2017) eK.L.R (Kenya), http://www.kenyalaw.org/kl/fileadmin/pdfdownloads/2017ElectionPetition/Presidential_Petition_1_of_2017.pdf .

## Dismissal of Complaint / Summary Judgment

There are a number of legitimate reasons for an investigative or adjudicatory body to close a case, including: the complaint does not appear to have sufficient impact on the exercise of election stakeholder rights or on electoral processes and outcomes to warrant investigation (or granting of remedies); the allegations do not fall within the investigative body's jurisdiction; or the statute of limitations has expired.[39] In addition, investigators should be empowered to dismiss allegations that appear to be frivolous.

In **Pakistan**, a complaint may be dismissed if it is:

- ✓ Not submitted in time for the ECP to grant an effective remedy or within the required deadline;
- ✓ Incomplete or does not meet the requirements for complaints (for example, if the complaint is missing the complainant's name and contact information, a detailed description of the allegation, or any evidence);
- ✓ Clearly unfounded;
- ✓ Outside the ECP's jurisdiction; or
- ✓ Not an alleged violation of election laws, electoral rules, or the Code of Conduct.[40]

In the **Philippines**, election contests can be dismissed if:

- ✓ The court has no jurisdiction over the subject matter;
- ✓ The petition is insufficient in form and content;
- ✓ The petition is filed beyond the period prescribed;
- ✓ The filing fee is not paid;[41] and
- ✓ In case of protest, where a cash deposit is required, the cash deposit is not paid within five days from the filing of the protest.[42]

It should be emphasized that, as discussed above, legitimate complaints that are incomplete or do not meet other requirements should not necessarily be dismissed on procedural grounds. Issues of due process should be balanced in the decision to dismiss a case.

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39 Canadian Investigators' Manual Ch. 3, *supra* note 21, at 3–4.

40 Handbook on the ECP Election Complaints Process, *supra* note 22, at 10.

41 To note, U.N. treaty body jurisprudence finds charging fees for fundamental rights petitions contrary to articles 2.3 of the ICCPR. *See, e.g.*, Constituição Federal [C.F.] [Constitution] art. 5, sect. XXXIV (Braz.).

42 Philippines Rules of Procedure in Election Contest for the Courts, A.M. No. 10-4-1-SC, Rule 2, sect. 12 (2010).

In **Kosovo**, the Election Complaints and Appeals Panel may summarily dismiss a complaint if it does not comply with appropriate legal provisions or if it does not establish a case on its face (a *prima facie* case).[43] EDR bodies should consider these examples in establishing criteria for dismissing a complaint. However, to reduce this process to its essential elements, investigators must presume that the evidence presented in a claim is true and accurate and then determine whether the claim contains sufficient evidence to support a judgment until contradictory evidence is presented; and, if proven true, whether the complaint would have an effect on election outcomes.

Penalties to address frivolous, malicious, or bad faith complaints can include dismissal of complaints and civil or criminal sanctions, such as fines or rulings of contempt, for complainants. A number of EMBs in emerging democracies have suffered "spamming" of their complaints investigation mechanism, where high numbers of non-outcome-determinative grievances divert scarce investigative resources away from cases with substantive merits. Both partisan and non-partisan actors can drive such "denial-of-service-attacks." The **Armenian** legal framework, therefore, expressly empowers its EMB to summarily dismiss complaints filed in abuse of justice.[44]

However, as addressed in the 2013 European Court of Human Rights decision for *Tymoshenko v. Ukraine*, while it is imperative for investigative bodies to take action against malicious or negligent complaints, such measures cannot deter political participation and the use of the electoral justice system. [45]

In order to build trust in the process, investigative bodies must thoroughly and transparently document the reasons for dismissing a complaint. When appropriate, they should also disclose the decision to the complaining party and other stakeholders.[46] This approach is reflected in several international and domestic mechanisms. For instance, when the UNDP Office of Audit and

43 Kosovo, Election Complaint and Appeals Panel, Guidebook on Complaints Process P. 15 (2010).

44 Electoral Code of the Republic of Armenia art. 49 (2016) ("Applications not containing any data or containing false data concerning the applicant, applications submitted in the abuse of a right, applications submitted by a non-competent person, as well as applications submitted in violation of requirements prescribed by paragraph 2 of this part shall not be considered, administrative proceedings shall not be initiated based thereon and electoral commissions shall render decisions on rejecting the initiation of administrative proceedings. In this case, the electoral commission shall have the right to conduct administrative proceedings on its own initiative.").

45 Tymoshenko v. Ukraine, App. No. 49872/11 Eur. Ct. H.R. at V (2013) (concerning complaints related to the detention of former Ukrainian Prime Minister, Yuliya Tymoshenko, with the court finding that: pre-trial detention was arbitrary; lawfulness of her detention had not been properly reviewed; and she had no possibility to seek compensation for her unlawful deprivation of liberty).

46 Canadian Investigators' Manual Ch. 3, *supra* note 21, at 4.

Investigations (OAI) preliminary assessment indicates that wrongdoing has not occurred, then the lead investigator prepares a closure note to propose closing the case. Based on this note, the Deputy Director of Investigations may decide to close the case and inform the complainant accordingly.[47]

In **Bhutan**, the Commission or Chief Election Coordinator is required to provide a reason for dismissing a complaint within two days of the office's finding.[48] It is important to note that, for summary dismissal decisions, there is often less formality than for the dismissal of a case once it has been fully investigated and heard. With respect to summary dismissal, some EDR bodies may, instead, not register the complaint. For instance, in the case of an incomplete complaint, a clerk of the Constitutional Court of **Indonesia** issues a deed stating that the complaint has not been registered in the Constitutional Case Register, although the complainant is notified. Whether or not a complaint is registered (which is a best practice), the reason for its dismissal should be provided and documented.

To promote public confidence in an effective investigative process, states should provide for measures that adequately respond to bad faith, malicious, or negligent complaints while preserving the right to an effective remedy in electoral justice. Because of the nature of elections, politically motivated complaints present the risk of delaying investigation and adjudication and, possibly, the certification of election results, which could ultimately affect the legitimacy of an election.

## Formal or Full Fact-Finding or Investigation Process

Once a decision (based on predetermined rules and procedures) is made to move forward with a full fact-finding/investigation process, then investigators should develop an investigation plan (discussed later in this guide). Any decision resulting from the preliminary assessment should merely justify further investigation and not serve as evidence for a final decision on the complaint. Before a complaint is in any way acted upon, allegations must be corroborated by evidence that meets pre-existing evidentiary standards. The

47 UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 6 (UNDP OAI does not provide closure notes to subjects, investigation participants, or any individuals named in the complaint).

48 Bhutan Election Dispute Settlement Rules and Regulations, *supra* note 28, ¶ 10.2.

*Uniform Guidelines for Investigations* stipulate that the decision on whether to pursue an investigation in any context should be made in accordance with the "rules, policies, and procedures of the Organization."[49] Extending this principle into the electoral context, the legal and regulatory framework should give the investigative body the discretion to develop its own uniform standards for the triage, assessment, and investigation processes. However, the decision of the investigative body must be reviewable by a court, as needed, although the investigators should be given authority to determine the standards and manner by which they prioritize and conduct investigations. One complicating factor in this process is that many EMBs still limit access to information and evidence.

Often, regulations provide the legal authority for proceeding with an investigation but do not provide specific, uniform guidelines on how to systematically exercise this authority. Investigative bodies should, therefore, establish their own procedures for investigating complaints. In its complaints procedure, the National Election Commission (NEC) in **Liberia** states that "the hearing, investigation and determination of challenges and complaints by the NEC [are to be] organized according to rules of procedures issued by the NEC."[50] Investigators of the **Australian** Electoral Commission rely not only on the regulatory framework but also on the guidelines, policies, charters, and codes of conduct to inform their election complaints process.[51]

The roles of investigators and election officials should be clear and open to the scrutiny of any interested parties—from the relevant authorities and dispute resolution bodies to the public at large.[52] In 2014, both the Federal Public Prosecutors' Office and the Federal Police in **Brazil** had an investigative mandate, with researchers finding that such institutional multiplicity appears to facilitate increased monitoring and investigation of corruption—in part because the mandate and rules of each body are clearly known.[53]

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49 Uniform Guidelines 2009, *supra* note 25, ¶ 31.

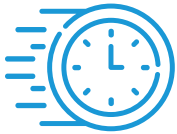
50 Election Comm'n of Liberia, Complaints Regulation ¶ 9.1 (2005).

51 Australian Election Complaints Management Policy, *supra* note 8; *see generally Better Practice Guide to Complaints Handling*, Commonwealth Ombudsman (2009) (outlining Australian standards for handling complaints in organizations, AEC Privacy Policy, AEC Service Charter, and Australian Public Service Code of Conduct).

52 *See* Violaine Autheman, IFES, The Resolution of Disputes Related to "Election Results:" A Snapshot of Court Practice in Selected Countries Around the World 6 (2004), http://aceproject.org/ero-en/topics/electoral-dispute-resolution/ConfPaper_Indonesia_FINAL.pdf.

53 Mariana Mota Prado & Lindsey Carson, *Brazilian Anti-Corruption Legislation and its Enforcement: Potential Lessons for Institutional Design* 8 (International Research Initiative on Brazil and Africa [IRIBA], Working Paper No. 09, 2014).

# THE FOUR PRINCIPLES



## 1| Prompt Investigation

The principle of prompt investigation is important because election processes and results are time-bound, evidence may be time-sensitive or subject to destruction following an election, and impunity for electoral offenses may linger from one electoral cycle to the next if not dealt with in a timely manner.

## 2| Thorough Investigation

The principle of thorough investigation is important for ensuring that any action taken in response to a dispute or allegation is based on sound evidence.

## 3| Effective Investigation

The principle of effective investigation is directly linked to the fact that individuals must have accessible and effective remedies in place to protect their political rights. The right to an effective remedy can be undermined if the investigation process into an alleged violation is not effective.

## 4| Impartial and Independent Investigators

The principle of investigations being undertaken by independent and impartial bodies is fundamental to the credibility and legitimacy of the investigation process and outcome.

# PRINCIPLE 1: PROMPT INVESTIGATION

**Principle:** The first principle underpinning this Guidebook, drawn from the ICCPR General Comment 31, is that investigations into allegations of wrongdoing in the electoral process should be conducted promptly.

The principle of prompt investigation is particularly important in the election context. Election processes and results are time-bound; evidence may be time-sensitive or subject to destruction following an election per statutory guidelines; and impunity for electoral offenses may linger from one electoral cycle to the next and harm the democratic process if not dealt with in a timely manner.

**Practice:** This chapter outlines the guidelines and principles that investigators can use to conduct prompt investigations, including a triage and preliminary assessment process, sound investigation planning, and appropriate deadlines.

To ensure a prompt investigation, it is important to:

- ✓ Properly classify the type of claim at issue;
- ✓ Conduct a preliminary assessment;
- ✓ Categorize complaints according to urgency and potential impact; and
- ✓ Ensure clear protocols are in place for decision-making and investigative processes.

**Chapter topics:** This chapter covers the following topics:

- ✓ Determining substance and urgency; and
- ✓ Ensuring an efficient investigation.

## Determining Substance and Urgency

### *Triage*

The process of prioritizing cases by level of urgency, known as *triage*, is an integral, yet complicated, component of timely electoral case management—particularly when there are a large number of complaints to deal with in a compressed timeframe and fundamental human rights are at stake. By assigning a level of urgency to each complaint, investigators can determine the order in which complaints should be handled. Like the medical triage system, which facilitates the allocation of services to where they are needed most, the triage approach in the electoral context aims for the most efficient and effective use of an investigative body's resources in the reduced timeframe available for the resolution of election disputes. The seriousness of an alleged violation, especially in terms of determinative effect on the results of an election, should be considered when deciding whether to pursue investigation.[54]

> Investigators must bear in mind that individual cases may not immediately appear to have an impact on the results of an election but that an accumulation of similar claims might. For example, one claim of voter intimidation may not impact the outcome of an election but thousands of similar claims might.

The *Uniform Guidelines for Investigation* support the prioritization of claims in an investigation by noting that preliminary assessments should "take into account the gravity of the allegation and the possible outcome(s)."[55] In addition, in *Namat Aliyev v. Azerbaijan*, the European Court of Human Rights found that "[i]t is first necessary to separately assess the seriousness and magnitude of the alleged election irregularity prior to determining its effect on the overall outcome of the election."[56]

Particularly in places where there are heavy complaint workloads and potential backlogs in the EDR system, there could be circumstances in which a complaint should be given priority because it may have a determinative impact on the election outcome, unlike smaller-scale claims that may not ultimately

54 Jacques C. Morin, *Le Droit de la Preuve et la Pétition en Contestation D'élection*, 20 Les Cahiers de Droit 153, 153–154 (1979).

55 Uniform Guidelines 2009, *supra* note 25, ¶ 32.

56 Namat Aliyev v. Azerbaijan, App. No. 18705/06, 1 Eur. Ct. H.R. 74 (2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98187.

affect the outcome. In addition to outcome-determinative disputes, high priority cases may include those pertaining to widespread public or parliamentary interests, systemic problems, public safety and national security, or government accountability.

Some states have instituted triage measures to address numerous complaints in a reduced timeframe. During the 2009 and 2010 electoral cycles in **Afghanistan**, for instance, the ECC categorized complaints in order to quickly identify which complaints regarding polling and counting should be adjudicated on a priority basis. Consequently, the ECC classified election complaints according to the following typology:

- **Priority A claims (e.g., ballot stuffing, counting/tallying fraud, widespread intimidation or violence):** the resolution of these claims affects the outcome of the election and needs to be handled immediately.
- **Priority B claims (e.g., intimidation, threats, campaigning at polling locations):** these claims include allegations of offenses that do not alter the outcome of the election but are still serious claims.
- **Priority C claims:** these claims do not require further investigation and may be dismissed because they do not establish a *prima facie* case, are clearly unfounded, or do not allege an electoral violation as provided in the electoral law.

In 2018, the ECC in Afghanistan continued to use this triage process.[57] The Afghanistan context has been particularly challenging because thousands of complaints were filed with the ECC, often making it difficult to determine whether claims were duplicate reports of the same issue or whether they were multiple compounding complaints. This distinction is important because, if the latter were the case, this would suggest a more widespread issue that would warrant a "priority A" categorization because it could potentially impact election results.

During the **French** legislative elections in 2007, the Constitutional Council developed a triage mechanism to minimize delays in the election adjudication

57 Law No. 112 of 2014 (Election Law), هیلدع تارازو No. 15/5/1392 of Aug. 6, 2014, art. 22.3 (Afg.) ("The units and expert teams shall study and assess the objections, complaint and relevant evidentiary proofs in terms of authenticity of the document, importance, dimensions and procedural and technical legal characteristics and shall prioritize them into various categories accordingly.").

process.[58] The Council created the following categories: inadmissible claims[59] (those that do not affect election results); claims involving adversarial proceedings[60] but not pecuniary damages;[61] and claims dealing with campaign finance issues (to be decided by the National Commission for Campaign Accounts and Political Party Financing).

Short deadlines in the law can make the triage process even more imperative. In **Kosovo**, the Central Election Commission (CEC) decisions must be appealed to the Election Complaints and Appeals Panel (ECAP) within 24 hours of the CEC's decision and the ECAP has 72 hours to make a decision.[62] According to interlocutors, complaints "go by order" to the data entry clerk (rather than being randomized or prioritized in terms of the complaint gravity). Stakeholders have called for better sorting procedures.[63] During the 2014 legislative elections, the ECAP received a total of 340 complaints and appeals. Ninety-six were approved and the rest rejected.[64] These numbers show the importance of a preliminary verification or triage process for ensuring efficiency and timeliness, especially given the tight deadlines enshrined in the Kosovar legislation, but also for ensuring that complaints are not being dismissed on procedural grounds as a means of meeting such tight deadlines.

However, it is imperative to note that, although the timely announcement of election results and correlated dispute resolution proceedings must take place "within a reasonable time" or "without undue delay,"[65] the process "must

58 Observations du Conseil constitutionnel Relatives aux Élections Législatives des 10 et 17 juin 2007, Conseil constitutionnel [CC] [Constitutional Court], Journal Officiel de la République Française [J.O.] [Official Gazette of France], June 4, 2008, p. 9205 (Fr.).

59 Inadmissible complaints include those in which the name of the subject of the investigation is missing or the complaint was submitted after the deadline.

60 *Adversarial Proceeding*, Black's Law Dictionary (9th ed. 2009) ("Adversarial proceedings" commonly refers to a court trial. Specifically, it is "any action, hearing, investigation, or inquiry brought by one party against another, in which the party seeking relief has given legal notice to and provided the opposing party with an opportunity to contest claims.").

61 *Pecuniary Damage*, Black's Law Dictionary (9th ed. 2009) ("Pecuniary damage" refers to a remedy that can be estimated in and compensated by money.).

62 Council, European Commission for Democracy Through the Law, Law No. 03/L-256 On Amending and Supplementing the Law No. 03/L-073 on General Elections in the Republic of Kosovo, art. 12 (Nov. 1, 2010), https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2018)017-e.

63 IFES, Training Needs Assessment for Election Complaints and Appeal Panel 7 (2016).

64 EUEOM, Final Report, 2014 Kosovo Elections 20 (2014), http://www.eods.eu/library/eu-eom-kosovo-2014-final-report_en.pdf.

65 Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171, art. 14 , sec. 1(c); Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, Nov. 41950, E.T.S. 5, art. 6, sec. 1; Organization of American States (OAS), American Convention on Human Rights, *Pact of San Jose*, Costa Rica, Nov. 22 1969, art. 8.

be balanced with the requirement to ensure other essential elements of due process are met."[66] In many countries, the timelines under which election commissions and administrative courts operate when investigating and resolving electoral disputes are unreasonable and due process protections are not met. In Armenia, for example, the interlocutors interviewed for an IFES technical election assessment generally agreed that administrative election personnel who are tasked with investigating and adjudicating complaints struggle to meet deadlines and are eager to dismiss cases on procedural grounds in order to meet the tight deadlines established in the law, which undermines due process protections. The same interlocutors stated that the administrative courts struggle to meet deadlines and tend to dismiss cases on procedural grounds because they do not have the time needed to properly investigate, hear, and resolve cases.[67] In complex cases that require in-depth investigations that cover large distances and involve numerous individuals, unreasonably tight deadlines further stretch the ability of under-resourced adjudicative bodies to conduct a thorough investigation and hold effective hearings. This limits their ability to ensure that they discover and verify the facts of claims before they make decisions. When overly restrictive timelines run counter to due process protections, they undermine electoral justice.[68]

In highly contentious environments, where investigators and adjudicators work under time and political pressures, systems that methodically prioritize and categorize complaints can allow investigators to focus on outcome-determinative cases, to strategically apply available resources, and to give adjudicators the ability to protect the due process and dismiss complaints that do not show probable cause.[69] However, to reinforce real and perceived fairness, the triage process must be determined before an election takes place, the notice about the process must be given to stakeholders, and it must be applied uniformly. Uniform standards provide an investigative body with consistency and give notice to stakeholders of both the procedural expectations and the likely outcome of the process. More importantly, established standards ensure the

66 Katherine Ellena, Chad Vickery, & Lisa Reppell, IFES, Elections on Trial: The Effective Management of Election Disputes and Violations 28 (2018).

67 Staffan Darnolf, Heather Szilagyi, & Chad Vickery, IFES, Technical Election Assessment Mission: Armenia 43 (2019).

68 *See* Ellena, Vickery, & Reppell, *supra* note 66.

69 Evidence is supportive of a judgment until the presentation of contradictory evidence; *See Evidence*, Black's Law Dictionary (2d ed. 1910) (evidence is supportive of a judgment until the presentation of contradictory evidence).

integrity and impartiality of the triage process by shielding the investigative body from political and social pressures that may interfere with the impartial assessment of complaints. General investigation standards, like the *Uniform Guidelines for Investigations* and the UNDP's OAI *Investigation Guidelines*, can inform the electoral investigations process.[70]

A well-coordinated triage process may also facilitate early identification of systemic problems in the electoral process, ensuring that there is time to address them. It also enables investigators to prioritize the use of resources in order to address issues of fraud or malpractice that might be outcome-determinative. To achieve these objectives, the triage process should track and review the facts alleged in individual claims and include an initial assessment of the available information and evidence.[71] Because the purpose of the triage stage only involves the process of categorization, further investigative steps (such as interviews, responses to allegations, and forensic examinations) should be delayed until a formal investigation is instigated.[72]

### *Preliminary Assessment*

Given the short timeframe for electoral investigations and adjudication, efficient preliminary assessment is crucial for an investigative body to act within the legal framework. The objectives of the preliminary assessment are to:

- ✓ Identify the basic allegations of a complaint;
- ✓ Identify any inconsistencies or outstanding issues in a complaint;
- ✓ Establish basic evidence and decide whether it suggests that a specific electoral offense or dispute exists; and
- ✓ Determine whether the evidence presented justifies further investigation.[73]

One example of a well-established preliminary assessment process comes from the **Australian** AEC, which adopted a *Complaint Management Policy* that

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70 *See generally* Uniform Guidelines 2009, *supra* note 25, ¶ 30 (applying principles specifically to auditors and investigators within the U.N. system); UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 8.3 (providing guidance on internal oversight of UNDP operations).

71 Canadian Investigators' Manual Ch. 3, *supra* note 21, at 2 (providing guidance to investigators as a complement to the Canada Elections Act).

72 UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 8.2 (identifying key components of the formal investigation stage).

73 *See* Canadian Investigators' Manual Ch. 3, *supra* note 21, at 1–9; UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 8.1.

sets out the principles and processes that investigators must follow when they manage a complaint.[74] Complaints are classified into five broad categories: (1) complaint of a general nature; (2) complaint of a legal nature; (3) complaint regarding fraud; (4) complaint regarding breach of privacy; and (5) complaint outside of AEC responsibilities.[75] One of the first steps taken when the AEC receives a complaint is to assess the urgency and/or seriousness of the complaint as well as its complexity. While the Policy does not specifically refer to an examination of whether a complaint may have an impact on the results of an election, this would, conceivably, be considered when looking at the urgency or complexity of the claim. This assessment then determines the specific timeframe needed to resolve the complaint (either within three working days or more than three working days) and the level of investigation needed to resolve the complaint.

Uniform and well documented decision-making during an investigation process increases transparency and trust in the overall electoral dispute resolution process. Elections **Canada** requires special investigators to document findings through "preliminary assessment report[s]"[76] that offer a recommendation to the Commissioner.[77] The Chief Investigator is responsible for producing timely, comprehensive reports to the Counsel to the Commissioner on any significant trends relating to oral complaints and for recommending the appropriate course of action.[78]

Similarly, the UNDP OAI provides guidance on general standards for decision-making in electoral investigations. Following a preliminary assessment, the UNDP OAI recommends producing internal, confidential documentation of decision-making, which would entail either: (a) a closure note or—if the assessment has shown that there is sufficient evidence to warrant a formal investigation—(b) a work plan for each complaint.[79]

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74 Australian Election Complaints Management Policy, *supra* note 8.

75 *Id.*

76 Canadian Investigators' Manual Ch. 3, *supra* note 21, at 5.

77 Canadian Investigators' Manual Ch. 4, *supra* note 32, at 4.

78 *See, e.g.*, Canadian Investigators' Manual Ch. 3, *supra* note 21, at 1.

79 UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 8.

## Elections Canada's "Thresholds Test and Standards" for Preliminary Assessment

The following factors should be considered in recommending whether to initiate, continue, or terminate an investigation:

**a)** Reasonable grounds to believe that the allegation deals with an alleged offense committed by an Election Officer or a specific offense committed by anyone under the [relevant election law];

**b)** Reasonable grounds to believe that the allegation is founded on specific and verifiable leads, facts, information, or physical documentary evidence, and deals with an act or omission that could constitute a specific offense under the [relevant election law];

**c)** Reasonable grounds to believe that the public interest relation to the act or omission…would justify committing investigative resources;

**d)** [S]ufficient grounds exist to believe that there is a reasonable prospect of identifying the suspect…;

**e)** Sufficient grounds to believe that the alleged offense was committed and that an investigation would provide sufficient, substantial, admissible and reliable evidence;

**f)** Sufficient grounds to believe that there is a reasonable prospect of identifying the suspect and obtaining compelling information or evidence to prove that an offense was committed by the alleged offender;

**g)** Reasonable grounds to believe that substantial, reliable and admissible evidence may be obtained from available avenues of investigation…;

**h)** Reasonable grounds to believe that suspects would agree to cooperate and provide information and evidence…;

**i)** Whether all reliable, substantial, available and admissible information or evidence have been collected on which to reach an informed decision;

**j)** Whether an assessment of the credibility of the information, the weight of

the evidence and the reliability of witnesses has been assessed on objective indicators or factors;

**k)** Whether any consideration should be given to the possible effect on the personal circumstances of anyone connected to the investigation;

**l)** Whether the inherent operational expenses associated with a more selective or comprehensive investigative approach (referral to other investigative agencies) to the various categories of expenses would be warranted and justified under the circumstances; [and]

**m)** Public interest factors, including:

**i.** The circumstances, the views, the reliability and credibility of the complainant and the specificity of the allegation raised;

**ii.** The need to maintain public confidence in the administration of justice and the integrity and fairness of the electoral process;

**iii.** The prevalence of the type of offense and any related need for a generic or specific deterrence...;

**iv.** The staleness of the alleged offense or likely length and expense of an investigation...; [and]

**v.** The availability and efficacy of any alternatives to investigation, such as administrative remedies and voluntary compliance measures by the alleged offender.

*From Canadian Special Investigators' Manual, Ch. 4 (p. 3–5).*

## Ensuring an Efficient Investigation

### *Investigation Planning*

An investigation plan helps guide the implementation of an investigation and enables investigative bodies to develop strategies for managing operations and coordinating with other bodies.[80] Establishing an investigation plan adds

80 U.N. Office on Drugs & Crime, U.N. Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators 38 (2004) [hereinafter U.N. Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators].

transparency to the electoral investigations process, promotes efficient use of an investigative body's resources, and ensures a systematic and uniform fact-finding process.[81]

Several countries use comprehensive investigation plans to manage criminal investigations. For instance, the American Bar Association's *Standards for Prosecutorial Investigation* emphasize the importance of a public prosecutor's collaboration with other participating agencies for devising an investigation plan that includes information on the case available at the outset of the investigation, investigation goals, anticipated investigation techniques, and any legal issues that may arise during the investigation.[82] Investigative bodies should require investigators to review work plans and any attached materials, as well as to acquire an understanding of the laws relevant to their assignment, before initiating an investigation.[83]

### Elections Canada Work Plan for Investigation of Alleged Election Offenses

Elections Canada prepares a "work assignment letter" that contains the following information:

- Steps, goals, and objectives of the investigation;
- Priority level for the investigation, expected timeframe for the completion of the investigation, and reporting requirements;
- Name of the Special Investigator responsible for the investigation;
- Relevant documentation;
- Summary of preliminary assessment findings and relevant investigation reports, election documents, and records related to the alleged offense;
- Documentation of the Commissioner's approval for the investigation and copies of all relevant documentation published by Elections Canada to assist in understanding the law;

81 *See, e.g.,* UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 8.3.

82 American Bar Ass'n, Standards for Prosecutorial Investigations §§ 1.3(e)(i)–(iv) (2008) [hereinafter ABA Standards for Prosecutorial Investigations].

83 *Id.* § 4.

- Names of individuals involved, such as claimants (if named), potential witnesses, potential sources of information, or suspects;
- Identified investigation techniques relevant to specific evidence and information;
- Whether any official caution[84] should be read to any individuals; and
- Whether any information may be disclosed or exchanged with local police force and law enforcement personnel during the course of the investigation.[85]

*From Canadian Special Investigators' Manual, Ch. 5 (p. 2–3).*

### *Timelines for Investigation*

Timeliness is an essential principle for investigations because it relates to ensuring an effective remedy, due process, and fairness (also discussed above under "*Triage*"). As such, the United Nations Human Rights Committee affirms that "[c]omplaints [of ill-treatment] must be investigated promptly and impartially by competent authorities so as to make the remedy effective."[86] In assessing whether an investigation has been prompt, the European Court of Human Rights considers the timing of the start of the investigation,[87] any delays in obtaining evidence or witness statements,[88] and the length of time taken during initial investigations.[89] Similarly, the American Bar Association provides that investigation bodies should "diligently pursue the timely con-

84 *See* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11, art. 10 (U.K.) (In Canada, police forces issue a "caution" to persons upon arrest, as required by the Charter of Rights and Freedoms. An arrested person has the right to be informed properly of the reasons for the arrest; to retain and instruct counsel without delay and to be informed of that right; to appeal the validity of the detention through habeas corpus proceedings; and to be released if the detention is not lawful.).

85 Comm'r of Canada Elections, *Ch. 5 Direction and Control of Investigation*, in Investigators' Manual 1–5 (2004) [hereinafter Canadian Investigators' Manual Ch. 5].

86 H.R.C. General Comment No. 20, ¶ 14, U.N. Doc. HRI/GEN/1/Rev.1 (Mar. 10, 1992) [hereinafter General Comment No. 20].

87 *Bati and Others v. Turkey*, App. No. 33097/96, Eur. Ct. H.R. 136 (2004); *see also Aksoy v. Turkey*, App. No. 21987/93 Eur. Ct. H.R. 1996, ¶ 98 ("[while it is] true that no express provision exists in the Convention as such as can be found in Article 12 of the 1984 United Nations Convention against Torture . . . which imposes a duty to proceed to a 'prompt and impartial' investigation whenever there is a reasonable ground to believe that an act of torture has been committed . . . such a requirement is implicit in the notion of an 'effective remedy' under Article 13").

88 *Assenov and Others v. Bulgaria*, App. No. 24760/94, Eur. Ct. H.R. 103 (1998).

89 *Labita v. Italy*, App. No. 26772/95 Eur. Ct. H.R. 133–236 (2000).

clusion of…investigations."[90]

The United Nations Committee on Economic, Social and Cultural Rights emphasizes that effective remedies do not necessarily have to be judicial. More timely administrative remedies may be appropriate:

> The right to an effective remedy need not be interpreted as always requiring a judicial remedy. Administrative remedies will, in many cases, be adequate and those living within the jurisdiction of a State party have a legitimate expectation, based on the principle of good faith, that all administrative authorities will take account of the requirements of the Covenant in their decision-making. Any such administrative remedies should be accessible, affordable, ***timely*** *[emphasis added]* and effective.[91]

The timeliness of an investigation is a critical factor in providing an effective remedy in electoral processes.[92] In this context, "accountability requires that time be of the essence."[93] As such, international and regional organizations stress the importance of timely resolution of election disputes. The *African Union Declaration on the Principles Governing Democratic Elections in Africa*, for instance, emphasizes that parties "shall have the right…to obtain timely hearing against all proven electoral malpractices to the competent judicial authorities in accordance with the electoral laws of the country."[94] Furthermore, the *African Charter on Democracy, Elections and Governance* directs states to establish and strengthen national mechanisms that redress election-related disputes in a timely manner.[95]

As the Venice Commission of the Council of Europe stresses, electoral pro-

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90 ABA Standards for Prosecutorial Investigations, *supra* note 82, § 2.14(a).

91 H.R.C. General Comment No. 9, ¶ 9, U.N. Doc. E/C.12/1998/24 (Mar. 12, 1998), https://www.escr-net.org/resources/general-comment-9.

92 *See generally* Patrick Merloe, *Human Rights – The Basis for Inclusiveness, Transparency, Accountability, and Public Confidence in Elections*, in International Election Principles: Democracy & the Rule of Law 3–41 (John Hardin Young ed., 12th ed. 2009).

93 *Id.* at 27.

94 African Union Declaration on the Principles Governing Democratic Elections in Africa, AHG/Decl.1 (XXXVIII), ch. IV, § 6 (2002).

95 African Charter on Democracy, Elections and Governance, ch. VII, art. 7.3, *adopted* Jan. 30, 2007 (effective Feb. 15, 2012), http://www.ipu.org/idd-E/afr_charter.pdf.

ceedings "should be as brief as possible."[96] Similarly, the *Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections* stipulates that "[s]tates should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the time frame of the electoral process...."[97] Finally, the Organization for Security and Cooperation in Europe (OSCE) Office of Democratic Institutions and Human Rights (ODIHR) also stresses that "election complaints should be subject to an expedited process of consideration that permits them to be resolved in a timely and effective manner."[98] Considering the general importance of the timely resolution of election contests, this principle also applies to (and constrains) the investigative process.

From a rights-based approach, some argue that the timeliness of the response is central to the voter's "essential freedom to choose."[99] The core principle at stake concerns the state's interest in "speedy resolution of potentially divisive issues."[100] In these contexts, investigative bodies necessarily have an interest in ensuring the conclusion of an investigation before the possible infringement of an electoral right becomes irreparable[101] and in preventing a lingering dispute that may bring the democratic process to a standstill, particularly in a tense political climate.[102] Investigative bodies should, therefore, consider what a reasonable amount of time would be that is necessary for promptly resolving election disputes.

Many countries include deadlines for resolving disputes into their laws or regulations, but it is less common to add formal time limits to the investiga-

96 Venice Commission, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report ¶ 95, 52nd Sess., Op. No. 190/2002 (May 23, 2003) (The Venice Commission points to two pitfalls in delaying the resolution of an election appeals process: "appeal proceedings retard the electoral process, and. . . due to their lack of suspensive effect, decisions on appeals which could have been taken before, are taken after the elections."); *see also* Benjamin E. Griffith & Michael S. Carr, *Effective, Timely, Appropriate, and Enforceable Remedies*, in International Election Principles: Democracy & the Rule of Law 373–397 (John Hardin Young ed., 12th ed., 2009).

97 Inter-Parliamentary Council, Declaration on Criteria for Free and Fair Elections art. 4, ¶ 9 (Mar. 26, 1994), http://www.ipu.org/cnl-e/154-free.htm.

98 OSCE Office of Democratic Insts. & Human Rights (ODIHR), Existing Commitments for Democratic Elections in OSCE Participating States ¶ 10.4 (Oct. 2003), http://www.osce.org/odihr/elections/13957.

99 Guy S. Goodwin-Gill, Inter-Parliamentary Union, Free and Fair Elections: International Law and Practice 158 (2006), http://www.ipu.org/pdf/publications/free&fair06-e.pdf.

100 *Id.*

101 Jesús Orozco-Henríquez et al., Int'l Inst. for Democracy & Electoral Assistance, Electoral Justice: The International IDEA Handbook 127 (2010).

102 Autheman, *supra* note 52, at 6.

tion process. For example, while there are no strict legal requirements for the timeline of an investigation, the **Australian** Electoral Commission's objective is to resolve complaints within 10 working days.[103] Because the resolution of electoral disputes requires prompt decisions and actions, the procedures and timelines should differ in speed and complexity from those provided for general civil disputes or criminal cases.[104] While the resolution of most election disputes and complaints requires a compressed timetable,[105] reconciling the seriousness of election-related grievances and the pressure for investigative bodies to act quickly is difficult in practice. Abbreviated timelines may undermine the investigative process. For instance, South Africa's Electoral Court, in *Mvelase v. Electoral Commission*, found that "[in] the best of times…investigation cannot be completed within the narrow limit of three days" prescribed for the Independent Election Commission.[106] In Kenya, the Supreme Court has noted that additional time is needed for presidential election petitions in case certain verification exercises—such as a vote recount or scrutiny process—are required. This challenge leads to questioning the purpose of such deadlines if they cannot be reasonably followed. The requirement for prompt resolution is a significant challenge because it involves critical consideration of the efficiency of the investigation and the complicated relationships between investigative, electoral administration, and dispute resolution bodies.

States should establish reasonable deadlines and timetables for investigations within the electoral legal framework.[107] A reasonable timeframe for an investigative process in an election case depends, among other things, on the circumstances of the case, the conduct of parties and authorities, and the interests at stake. These interests may include recovery and preservation of evidence and witness statements and the timetables prescribed by election

103 Australian Election Complaints Management Policy, *supra* note 8 ("We aim to provide a response to all complaints within ten working days, unless we have informed the complainant it will take longer.").

104 Denis Petit, OSCE Office of Democratic Insts. & Human Rights, Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System 11 (2000), http://www.osce.org/odihr/elections/17567.

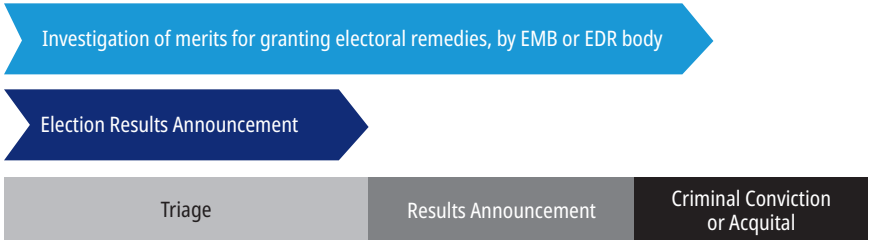
105 Robert Dahl, Electoral Complaint Adjudication and Dispute Resolution: Key Issues and Guiding Principles, Remarks at the 2008 General Assembly of the Association of Asian Election Authorities (July 22, 2008)

106 *Myelase and Another v. Electoral Commission and Others* 2009 (1) ZAEC 2 (S. Afr.) (The regulatory framework requires the Independent Election Commission to consider and decide upon election objections within three days of receipt. The commission must either (i) reject the objection; (ii) amend the declared result of the election; or (ii) rescind the declared result of the election.); *see* Electoral Commission Act 51 of 1996 § 65(4) (S. Afr.).

107 Griffith & Carr, *supra* note 96, at 379.

laws, regulations, or policies.[108] When setting time limits, investigative bodies must ensure sufficient time for collecting and reviewing evidence as well as for adjudicating the specific complaint.[109]

Finally, it is important to note that only the electoral remedy (e.g., election recount, audit, annulment, or re-run) is time-bound. Criminal convictions can proceed along a longer time horizon without impacting the granting of electoral remedies. Proving electoral irregularities according to the civil standard of proof (the balance of probabilities) or even a slightly higher intermediary standard can proceed much more expeditiously than proving—beyond reasonable doubt—that an accused individual has intentionally committed a criminal electoral offense. Triage mechanisms must, accordingly, have two separate investigation tracks: one for criminal investigation and prosecution, which can operate past the announcement deadlines for preliminary and final results, and one for investigating the merits of granting electoral remedies, which must be completed in time for the announcements of the results.




108 *Id.*

109 Petit, *supra* note 104.

# PRINCIPLE 2: THOROUGH INVESTIGATION

**Principle:** The second principle underpinning this Guidebook is that investigations into allegations of wrongdoing in the electoral process should be conducted thoroughly. The principle of thorough investigation is important for ensuring that any action taken in response to a dispute or allegation is based on sound evidence.

**Practice:** This section outlines the guidelines and principles that investigators can use to conduct thorough investigations, including collecting evidence, conducting interviews, analyzing evidence and presenting findings, and keeping accurate records. A thorough investigation that produces sound evidence requires that:

- ✓ Acceptable types of evidence are pre-determined;
- ✓ Evidence is substantiated and corroborated;
- ✓ Different sources of evidence are sought;
- ✓ The standard of evidence to be used is clear;
- ✓ Search and seizure processes are followed;
- ✓ Interviews are planned, conducted, and documented properly;
- ✓ Evidence is analyzed and presented appropriately; and
- ✓ Adequate document retention and data protection strategies are in place.

**Chapter topics:** This chapter covers the following topics:

- ✓ Evidence;
- ✓ Conducting interviews;
- ✓ Analyzing evidence and presenting findings;
- ✓ Findings, referrals, and notifications; and
- ✓ Accurate record-keeping and document retention.

## Effective Evidence Collection

As the United Nations High Commissioner on Human Rights affirms, the "purpose of an investigation should be to secure independent evidence."[110] Collecting and corroborating substantiated evidence goes to the very heart of an election investigation. The *Uniform Guidelines on Investigations* plainly state that "[i]nvestigative findings shall be based on facts and related analysis."[111] Consequently, according to the United Nations General Assembly, investigators must "identify and obtain all relevant information and evidence to establish facts relevant to an allegation, resulting in the facts being confirmed or refuted."[112]

### *Pre-Determined Types of Evidence*

The types of evidence that are admissible in proving the elements of a claim are often not mentioned in the law but may be described in regulations or procedures. In **Moldova**, the complaints regulations include a list of evidence that can be submitted[113] and the 2018 **Afghan** *Procedure on Adjudication of Complaints* lists some examples of "evidentiary proofs."[114] More often, types of admissible evidence are presented in dispute resolution guidelines or manuals. For example, the 2015 **Pakistan** *Election Tribunal Handbook* and the 2015 **Myanmar** *Election Dispute Resolution Manual* explain the types of evidence that can be submitted when filing a complaint or presented during a hearing. There are some exceptions to these general rules, including the **Ukrainian** election law, which includes a relatively extensive section that

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110 U.N. High Comm'r on Human Rights, *Human Rights Standards and Practice for the Police: Expanded Pocket Book on Human Rights for the Police*, at 12, U.N. Doc HR/P/PT/5/Add.3, U.N. Sales No. E.03.XIV.7 (2004), http://www.ohchr.org/Documents/Publications/training5Add3en.pdf [hereinafter Human Rights Standards and Practice for the Police].

111 Uniform Guidelines 2009, *supra* note 25, ¶ 8; *cf.* Seventh U.N. Congress on the Prevention of Crime and the Treatment of Offenders, *Basic Principles on the Independence of the Judiciary* ¶ 2 (Sept. 6, 1985), U.N. Doc. A/CONF.121/22/Rev.1, at 59 (1985), *unanimously endorsed by* G.A. Res. 40/32, U.N. Doc. A/RES/40/32 (Nov. 29, 1985), G.A. Res. 40/146, U.N. Doc. A/RES/40/146 (Dec. 13, 1985) [hereinafter Basic Principles on the Independence of the Judiciary] (judicial decisions shall be made "on the basis of facts").

112 Rep. of the Joint Inspection Unit, Investigations Function in the United Nations System, ¶ 59, U.N. Doc. A/67/140; GAOR, 67th Sess. (Jul. 13, 2012) (describing the duties of an investigator as opposed to an auditor).

113 Law No. 1381-XII of 1997 (Electoral Code of the Republic of Moldova), Monitorul Oficial al R.Moldova No. 81/667 of July 12, 1997, ch. 3, 9 (Moldova) ("As evidence to support the submitted complaint may be used audio / video recordings, photographs, documents, written statements of witnesses.").

114 Law No. 112 of 2014 (Election Law), هیلدع تارازو No. 15/5/1392 of Aug. 6, 2014, art. 4.10 (Afg.) ("This includes written document, photo, voice, signs and marks which are provided by both parties of the case in relation to objection and complaint and/or defense for proving the occurrence and perpetration of the electoral violations and crimes and which are deemed admissible and useable by the Complaints Commission and if deemed necessary by the Commission, shall have been accepted by the experts. Confession by the confessor also falls under the category of the evidentiary proofs.").

summarizes the various types of evidence that investigators can consider.[115]

It is worth noting that it is common for EMBs and other investigative bodies to refer to the civil code of procedures or rules on evidence from the judiciary instead of designing their own. This practice can create additional hurdles for investigators because the formalities of evidence might not be appropriate for an election adjudication process, where timeliness is a more pressing concern. In **Myanmar**, Election Tribunals (temporary bodies established to adjudicate post-election petitions against the results) follow the code of civil procedure.[116] During its post-election review, the Union Election Commission and Tribunal members expressed a desire to develop special procedures distinct from the Code of Civil Procedure. Although pre-determined rules of evidence ought to be applied and to provide guidance to investigators, it is impossible to list every type of evidence that could come up in every situation. Hence, adjudicators must have some flexibility to gather and consider any evidence that brings clarity to the question at hand. In **Kenya**, the Political Parties Disputes Tribunal (PPDT) developed rules of procedure, noting that the tribunal was "not bound by technicalities or legal rules of procedure and may waive any rules or procedural requirements."[117]

### *Substantiating and Corroborating Evidence*

In the high-pressure political atmosphere that surrounds election periods, particularly when an overwhelming narrative of fraud dominates public discourse, investigators cannot overlook the need for a thorough investigation that substantiates the claims of fraud or malpractice alleged against election officials or other electoral stakeholders.

In the 2010 **Afghanistan** presidential election, for instance, many tally forms submitted to the Independent Election Commission (IEC) and Electoral Complaints Commission (ECC) contained both administrative errors and evidence of fraud. Several of these tally forms met investigatory triggers[118] and fell into

115 *See* Law of Ukraine on Election of the People's Deputies of Ukraine, No. 4061-VI, art. 112(1) (2011) (unofficial IFES translation).

116 Pyithu Hluttaw Election Law ch. 15 (2010) (Myanmar); Myanmar Const. ch. IX (2008).

117 Kenya Political Parties Disputes Tribunal Rules of Procedure § 40 (2017).

118 *See* Eur. Union Election Assessment Team, Final Report: Islamic Republic of Afghanistan Parliamentary Elections, September 18, 2010, 24 (2011) (triggers included the total number of votes [valid + invalid] that exceeded or equaled 600; more than 90 percent of valid and invalid votes were cast for one candidate [against the total of invalid and valid votes]; or there were inconsistencies greater than 4 percentage points between the total number of ballot papers withdrawn from the ballot box and the total number of valid and invalid votes).

at least one of two categories: (1) tally forms suspected of being fraudulent, which were further investigated by the IEC and (2) forms that clearly contradicted set thresholds, such as votes cast in excess of the 600 ballots provided to a polling station or those that were deemed "obviously fraudulent."[119] Based on these triggers, investigations, and subsequent findings, the forms that were deemed to be fraudulent were thrown out entirely.[120] Unfortunately, international observation reports and many Afghan stakeholders indicated that, in some cases, triggers were not used merely as a starting point for investigation but as conclusive evidence that justified invalidating votes without substantiating the claims with corroborating evidence. The concern is that valid votes were thrown out solely on the basis of these triggers, without further investigation. Although the available records are not entirely clear on how many ballots were thrown out solely due to the use of these triggers, public perception was that this practice was widespread. Even when rigorous investigations were conducted and corroborating evidence was found, neither the investigation process nor the decisions it generated were known or fully understood by relevant stakeholders. Furthermore, stakeholders did not receive clear explanations on how issues of administrative error and those of clear fraud would be resolved differently. This lack of transparency, whether real or perceived, led to speculation and diminishing trust in the electoral process.[121]

Afghanistan's experience illustrates three essential elements of investigation processes: first, transparency; second, proper documentation and disclosure of the steps taken; and third, safeguards to ensure that triggers are only applied as the first step in triage and investigation. Any trigger that has been designed to identify questionable behavior or results must be investigated and corroborated with further evidence before being used to dismiss elections results outright.

A thorough investigation also requires investigators to consider multiple types of evidence. Additionally, because the "purpose of an investigation should be to secure independent evidence,"[122] an investigator should aim

119 *Id.*

120 IFES, Afghanistan Electoral Integrity Assessment Final Report 61–62 (2013) (unpublished report) (on file with IFES).

121 *Id.*

122 Human Rights Standards and Practice for the Police, *supra* note 111.

to corroborate information.[123] A failure to do so can severely limit the effectiveness of the investigation. In *El-Masri v. the Former Yugoslav Republic of Macedonia*, the European Court of Human Rights defines a thorough investigation as one that is based on substantiated evidence. Noting the necessity of a "prompt and thorough" investigation of rights violations, the Court explained that substantiated evidence "means that the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or to use as the basis of their decisions." Rather, "they must take all reasonable steps available to them to secure the evidence concerning the incident."[124] According to the European Union Election Observation Mission to **Kosovo** in 2014, on many occasions investigators "adopted a formalistic approach and did not always proactively search for evidence," during the legislative elections. Consequently, many complaints were rejected without the needed evidence.[125]

As a practical matter, the thorough investigation requirement means that an investigator should not rely on hearsay (information or statements from other people that cannot be otherwise substantiated or corroborated) and should make every effort to confirm evidence firsthand. For example, in its *Complaints Regulations*, the **Liberia** National Election Commission states that a "challenge or a complaint shall not be based on hearsay and must be made by an individual who has personal knowledge of or was a witness to the matters that are the basis of the challenge or complaint."[126] In **Moldova**, the EMB investigators are required to verify the form and content of a complaint and the law clearly states that the "evidences submitted must meet the requirements of admissibility and relevance."[127]

The European Court reaffirmed the importance of substantiated evidence in several election-related cases. In *Hajili v. Azerbaijan*, the applicant—a candidate for the National Assembly—lodged a complaint with the Central Electoral Commission (CEC) of Azerbaijan alleging that voting records from several

123 Uniform Guidelines 2009, *supra* note 25, ¶ 33.

124 *Id.*

125 EUEOM, Final Report, Kosovo 21 (2014), http://eeas.europa.eu/archives/eueom/missions/2014/kosovo/pdf/eu-eom-kosovo-2014-final-report_en.pdf.

126 Election Comm'n of Liberia, Complaints Regulations, ¶ 3.1 (2005).

127 Law No. 1381-XII of 1997 (Electoral Code of the Republic of Moldova), Monitorul Oficial al R.Moldova No. 81/667 of July 12, 1997, ch. 3, 9 (Moldova).

polling stations had been falsified in favor of his opponent. After the CEC and the Court of Appeal rejected his appeal, the European Court determined that "the decisions of the electoral commissions and domestic courts lacked any factual basis."[128] As "they refused to examine any primary evidence," the European Court concluded, the domestic arbiters' decisions undermined the integrity and effectiveness of the process and violated the applicant's rights under the European Convention.[129]

In a similar case, *Namat Aliyev v. Azerbaijan*, the applicant submitted a complaint alleging a number of electoral violations, such as voter intimidation, multiple voting, and ballot-box stuffing. He offered extensive evidence in support of his complaint, including more than 30 affidavits from election observers, audio tapes, and other documents. Nevertheless, the Constituency Electoral Commission, the CEC, and the Court of Appeal all dismissed the applicant's complaint as unsubstantiated. Although the domestic authorities "should have reacted by taking reasonable steps to investigate the alleged irregularities," the European Court concluded, in ruling for the applicant, that "there is no indication that any detailed assessment of the substance of the applicant's allegations was attempted or that any genuine effort was made to determine the validity of his claims."[130]

In the *Namat Aliyev* case, the European Court also emphasized that the need for a timely resolution of electoral disputes does not outweigh the responsibility to undertake a thorough review of the evidence:

> The Court acknowledges that, owing to the complexity of the electoral process and associated time-restraints necessitating streamlining of various election-related procedures, the relevant domestic authorities may be required to examine election-related appeals within comparatively short time limits in order to avoid retarding the electoral process....Nevertheless,...it must be ensured that a genuine effort is made to address the substance of arguable indi-

128 *Hajili v. Azerbaijan*, App. No. 6984/06 Eur. Ct. H.R. 31 (2012); *accord Kerimova v. Azerbaijan*, App. No. 20799/06 Eur. Ct. H.R. 31 (2010) (concluding, in an analogous case with a nearly identical fact pattern, that "the decisions of the electoral commission and domestic courts lacked any factual basis").

129 *Hajili v. Azerbaijan*, App. No. 6984/06 Eur. Ct. H.R. 56, 57 (2012); *accord Kerimova v. Azerbaijan*, App. No. 20799/06 Eur. Ct. H.R. 31, ¶ 52 (2010) (similarly concluding that the domestic courts "refused to examine any primary evidence").

130 *Namat Aliyev v. Azerbaijan*, App. No. 18705/06, 2010 Eur. Ct. H.R. 88, 83 (2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98187.

> vidual complaints concerning electoral irregularities and that the relevant decisions are sufficiently reasoned.[131]

Azerbaijan's failure to consider the evidence in the *Namat Aliyev* case can be contrasted with the actions of the Commission on Elections (COMELEC) in the **Philippines**, as described in a domestic Supreme Court case, *Domingo v. Commission on Elections*. The petitioner appealed to the Supreme Court after COMELEC dismissed his complaint based on insufficient evidence and lack of merit. The Supreme Court, however, upheld COMELEC's decision because it "was arrived at only after a careful scrutiny of the evidence at hand, especially of the videotapes of the petitioner."[132] The comprehensive examination of the evidence was "clearly evident" and "quoted extensively from the pleadings and evidence of petitioners, and provided adequate explanation for why it considered petitioner's evidence insufficient and unconvincing."[133]

In the landmark *Shri Raj Narain v. Smt. Indira Nehru Gandhi* case, the Supreme Court of **India** also emphasized the importance of substantiated facts and evidence.[134] In 1971, Indira Gandhi won a seat in the lower house of Parliament. Shri Raj Narain, one of her rival candidates, challenged her victory in an election petition to the High Court. After the High Court voided the election, Gandhi appealed to the Supreme Court. Concluding that the High Court's findings were not based "on any direct evidence whatsoever," the Supreme Court overturned

A particular challenge in some jurisdictions is the fact that election petitions—particularly those relating to high office (such as president)—may be heard in the first instance by an apex or appellate court that has limited capacity for fact finding (as they are, by nature, usually focused on points of law in appellate cases).

131 *Id.* ¶ 90.

132 *Domingo v. Commission on Elections*, G.R. No. 136587 (S.C., Aug. 30, 1999) (Phil.), http://sc.judiciary.gov.ph/jurisprudence/1999/aug99/136587.htm.

133 *Id.*

134 Shri Raj Narain v. Smt. Indira Nehru Gandhi (1975), *reprinted in* Election Comm'n of India, Landmark Judgments on Election Law 87–359 (vol. I, 1999), https://eci.gov.in/files/file/6955-landmark-judgments-for-volume-i-volume-ii-volume-iii-volume-iv/.

the trial judge's ruling and upheld Gandhi's victory.[135] Finders of fact should not treat election disputes "in a light-hearted manner" by relying "on unsubstantial grounds and irresponsible evidence," the Court warned—instead, they "must look for serious assurance, unlying [*sic*] circumstances or unimpeachable documents."[136]

In a more recent case, the Election Commission of **India** underscored the necessity of balancing the prompt resolution of a dispute with a thorough analysis of the evidence.[137] In the dispute at issue, two splinter groups of one nationally-recognized political party each laid claim to the use of the same symbol on the ballot only a few days before the election. When the Election Commission asked the two groups to file documentary proof to substantiate their respective claims, the request resulted in "voluminous records" containing "contentious issues and factual controversies."[138] Rather than come to a hasty decision, which "would be unfair and detrimental to the interests of both the contending parties," the Commission acknowledged that "no firm view can be formed on the basis of such disputed affidavits and controversial evidence."[139] Recognizing instead the need for "proper investigation and examination," it postponed its decision until it could conduct "a further probe" of the evidence.[140] Given the urgency of the upcoming

### Types of Evidence in Election

- Documentary (e.g., official election forms and materials, campaign finance reports)
- Video or audio
- Photographic
- Electronic (e.g., data, data analysis, logs)
- Interviews or testimony
- Official election observation reports
- Physical (e.g., ballot boxes)
- Expert testimony
- Any other evidence needed to establish the facts of the case

135 *Id.* ¶ 402.

136 *Id.* ¶ 480.

137 In re: Dispute Case No. 1 of 1999 (Aug. 7, 1999), *reprinted in* Election Comm'n of India, Landmark Judgments on Election Law 336–345 (vol. III, 2000).

138 *Id.* ¶¶ 14, 15.

139 *Id.*

140 *Id.*

election, however, the Commission decided to forbid each splinter group from using the contested symbol in the interim.

When it reconsidered the case after the election, the Commission "carefully examined and considered" all the evidence, including several hundred individual affidavits.[141] Each splinter group, however, "dispute[d] the veracity of many of the affidavits filed by the other group but without any evidence to substantiate the allegation."[142] Therefore, the Commission decided that it was impossible to come to a conclusion and did not allow the party name or symbol to be used by either group.[143]

### *Sources of Evidence*

Investigators must consider information from different sources, including affidavits and other documentary evidence as well as audio recordings of witness testimony. The *Uniform Guidelines for Investigations* reflect this broad mandate, recommending that investigative activity should include "the collection and analysis of documentary, video, audio, photographic, and electronic information and other material, interviews of witnesses, observations of investigations, and such other investigative techniques as are required to conduct the investigation."[144]

In an election investigation, documentary evidence often has particular importance. In **Canada**, the *Special Investigators' Manual* provides investigators with a list of the types of official election documents that they may consider during an investigation. These include nomination papers filed by candidates, documents related to revisions made to the voter list, and various polling station returns enclosed in sealed envelopes, such as the packets of cast, rejected, and spoiled ballot papers.[145] Special investigators may also consider "other documents," meaning "the various statements, books and records relating to an election campaign and which may be required for the investigation of an alleged infraction."[146] Examples include

141 In re: Dispute Case No. 1 of 1999 ¶ 10 (Sept. 27, 2000), *reprinted in* Election Comm'n of India, Landmark Judgments on Election Law 386–394 (vol. III, 2000).

142 *Id.* ¶ 11.

143 *Id.*

144 Uniform Guidelines 2009, *supra* note 25, ¶ 34.

145 Comm'r of Canada Elections, *Ch. 8 Access to Records, Books and Documents*, in Investigators' Manual 1–11 (Appendix I) (2000) [hereinafter Canadian Investigators' Manual Ch. 8].

146 *Id.*

deposit slips, cancelled checks, or bank statements demonstrating campaign expenses; lists of contributions of goods and services; and other statements documenting the personal expenditures of candidates.[147]

Efforts to collect and substantiate all the relevant facts in a case can also include the analysis of physical evidence, such as ballot boxes or campaign posters. **Bhutan's** *Election Dispute Settlement Manual* notes that "an investigator may, at times, be able to find more evidence at the place where the act was committed."[148]

Some countries—including **Chile**, **Costa Rica**, **Ecuador**, **Mexico**, and **Peru**—require complainants to attach supporting documentary evidence for their initial claim.[149] In these cases, investigators must examine the issue more fully by considering, "whether the recorded information is sufficient, reliable and substantial enough to either prove or refute the allegations of the complaint."[150] Furthermore, they should strive to corroborate the evidence by determining "whether the recorded information cross-matches or corresponds with other related information from documentary records and available sources of information."[151]

### *Threshold of Evidence Required to Trigger a Full Investigation*

How does an adjudicator know when to proceed with an investigation after receiving a complaint? How can an adjudicator dismiss cases with good cause, not proceed with a full investigation, and maintain notions of fairness by all stakeholders? The first step is establishing a threshold or standard of evidence that a complainant must meet in order to trigger an investigation by appropriate officials. Importantly, to meet due process protections, the contours and practical applications of the standard need to be clear in the law and understood by adjudicators, lawyers, investigators, and other pertinent stakeholders before the standard is applied in the field—an element

147 *Id.*

148 Bhutan Election Dispute Settlement Manual, *supra* note 27, ¶ 6.3.

149 Orozco-Henríquez et al., *supra* note 101, at 166.

150 Comm'r of Canada Elections, *Ch. 10 Inspection, Review and Analysis*, in Investigators' Manual 1–5 (2000) [hereinafter Canadian Investigators' Manual Ch. 10].

151 *Id.*

### Evidential Considerations around Election Technology

The **Democratic Republic of Congo (DRC)** procured electronic voting machines (EVMs) for its 2018 national elections based on the rationale that EVMs can print as many copies of result protocols as requested by party agents. Since Congolese elections can attract high numbers of candidates and lists, the carbon-copy approach left many party agents empty-handed and thus deprived of actionable evidence for EDR. In 2018, the Congolese counting process produced two types of result protocols—those printed by the EVMs (*fiches de résultats*), which were given to party agents, and those hand-written by counting staff (*process-verbaux*), which were handed up the chain-of-custody to regional aggregation centers. When result-determinative discrepancies transpired between parallel candidate aggregation based on EVM-printed forms and the EMB official results, candidates petitioned the Constitutional Court and tried to enter the EVM-printed result forms into evidence. The Constitutional Court, however, rejected the EVM-printed result forms as inadmissible (even if they were signed by the head-of-polling station), holding that only the handwritten forms constituted conclusive evidence.

missing in many existing electoral legal regimes.[152]

Just as there is currently no international consensus on the standard of evidence for the adjudication of administrative electoral disputes,[153] there is also no uniform standard of evidence that is used to determine whether or not to proceed with investigations.[154] In fact, there are scant provisions in election laws about evidentiary rules in general,[155] and even less about those specifically related to the investigative process. Nevertheless, the notion of probable cause does give some guidance.

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152 *Cf.* GUARDE, *supra* note 1, at 66 (discussing how, during the adjudication stage, "the exact standard [of evidence] to be applied in any particular case should be established in advance of the hearing rather than chosen by the arbiter on an ad hoc basis").

153 *See id.* at 61–67.

154 The term "standard of evidence" refers to the degree to which one side in a dispute must prove its case in order to persuade the arbiter or finder of fact that it is correct. *See generally id.* at 61 (describing the three standards of evidence frequently applied in elections cases: preponderance of the evidence, evidence beyond a reasonable doubt, and clear and convincing evidence). In contrast, the term "standard of proof" here refers to the benchmark that an investigator can use to determine whether or not the available evidence substantiates a complaint.

155 OROZCO-HENRÍQUEZ ET AL., *supra* note 101, at 165.

In *Baytan v. Commission on Elections*, the Supreme Court of the **Philippines** highlighted how probable cause serves as a standard for determining whether an allegation merits being investigated and brought to trial. Petitioners in this case inadvertently registered to vote in two different precincts. Realizing their error, they went to the Commission on Elections (COMELEC) to remedy the situation. When COMELEC subsequently issued a resolution initiating an investigation against them, the petitioners appealed to the Supreme Court, arguing that COMELEC had committed a grave abuse of discretion. The Supreme Court disagreed: "Petitioners lose sight of the fact that the assailed resolutions were issued in the preliminary investigation stage." An "essentially inquisitorial" administrative investigation only requires "the determination of probable cause to justify the holding of petitioners for trial." Furthermore, the Court concluded that the petitioners' claims of honest mistake, good faith, and substantial compliance "are matters of defense best ventilated in the trial proper." An investigation is "not the occasion for the full and exhaustive display of the parties' evidence," the Court maintained. "It is for the presentation of such evidence only as may engender a well-grounded belief that an offense has been committed and the accused is probably guilty thereof."[156]

As this example illustrates, it is reasonable for an adjudicator to require that a complaint contains sufficient factual matter so that—if accepted to be true—the arbitrator can determine that the facts pleaded "plausibly give rise" to a legitimate claim.[157] If the arbitrator determines that a complaint raises facts that could plausibly lead to relief, then the proceedings should continue.[158] An adjudicator can also pursue matters that they determine to contain a "legitimate governmental interest"[159] *or when a reasonable person would believe that a complaint is true and should be pursued. In the end,* an arbitrator needs to "draw on its judicial experience and common sense [in considering a motion to dismiss]"[160] or in deciding to proceed. In all instances, they must document and disclose their reasoning as to why they decided to

156 *Baytan v. Commission on Elections*, G.R. No. 153945 (2003), http://sc.judiciary.gov.ph/jurisprudence/2003/feb2003/153945.htm.

157 *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009); Fed. R. Civ. P. 8.

158 *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. at 680; Fed. R. Civ. P. 8.

159 *Torres v. Puerto Rico,* 442 U.S. 465, 471 (U.S. 1979).

160 *Ashcroft*, 556 U.S. at 679 (2009).

dismiss or pursue a complaint.

In the election investigation context, adopting too strict a standard for triggering investigations could thwart meritorious claims from being properly examined. On the other hand, adopting too lenient a standard could flood investigators with warrantless claims. Given the need to strike a balance between these two extremes, investigators should rely on an adequate standard to determine whether a complaint has been sufficiently substantiated before proceeding with an investigation.

### *Search and Seizure*

Investigative bodies have the responsibility to "establish standing orders emphasizing legal safeguards for investigations."[161] An important aspect of these safeguards is the protection of the privacy and property rights of those being investigated. Therefore, the legal framework should clarify any applicable search and seizure rules when investigating the role that individuals may have played in the crime or administrative issue in question. In administrative cases, where the state holds the evidence in question, the administrative body must fully cooperate with the adjudicator in producing and securing evidence.

The term "search and seizure" refers to the procedure by which law enforcement officers or other authorities (here, election investigators) examine the property or possessions believed to suggest the commission of a crime or electoral misconduct and then take these articles as evidence. Each country affords police and other law enforcement officials with varying degrees of discretion in carrying out search and seizure activities, although many countries require some type of court-authorized warrant. In civil law (or inquisitional) countries, a judge may play a larger role in leading an investigation and procuring evidence, depending on the type of complaint and the election dispute resolution mechanism in place. EMBs have access to election materials, which generally constitute the majority of relevant evidence. However, if any party to the case, including the EMB, believes that important evidence is in the possession of others, they can request that a judge investigates and orders another party (including third parties) to produce this evidence. It is ultimately up to the judge to determine whether the evidence is relevant and admissible.

161 Human Rights Standards and Practice for the Police, *supra* note 111.

In common law countries with constitutional protections against unreasonable searches and seizures, election investigators may need to obtain a warrant before collecting evidence. In **Canada**, for example, the *Special Investigators' Manual* emphasizes that investigators cannot compel the production of documentary evidence without a court order.[162] As a result, this manual includes extensive directions for obtaining a search warrant.[163]

Unlike Canada, however, the vast majority of states do not currently provide any guidance for election investigators about possible search and seizure requirements nor how they might apply to different types of violations or offenses. In many legal systems, if an investigator secures evidence in an unacceptable manner, the adjudicative body can later exclude this evidence from consideration even if it provides conclusive proof of guilt or wrongdoing.[164] By failing to collect the evidence correctly, an investigator can compromise the primary purpose behind an election investigation, which is to provide the adjudicator with reliable, substantiated information that can contribute to the impartial resolution of an electoral dispute.

## Conducting Interviews

Interviews allow investigators to clarify and corroborate evidence, which facilitates reaching a final decision based on an objective assessment of the facts. Eyewitness interviews can also serve as a source of evidence in a case. As the *Uniform Guidelines on Investigations* note, "interviews of witnesses" are one important avenue for verifying evidence.[165]In *El-Masri v. the Former Yugoslav Republic of Macedonia*, the European Court of Human Rights agreed that the collection of evidence during an investigation should include testimony from eyewitnesses.[166]

At the same time, the Canadian *Special Investigators' Manual* also acknowl-

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162 *See* Canadian Investigators' Manual Ch. 8, *supra* note 146, at 4.

163 *See generally id.* appendices 4–5.

164 In the United States, this principle is known as the "exclusionary rule"; in Germany, *Beweisverwertungsverbote* (prohibitions on the use of evidence); and in Italy, *inutilizzabilità* (non-usability). *See generally* Ius Gentium: Comparative Perspectives on Law & Justice, Exclusionary Rules in Comparative Law (Stephen C. Thaman ed., 2013) (examining the national and international human rights dimensions of exclusionary rules in various civil and common law countries).

165 Uniform Guidelines 2009, *supra* note 25, ¶ 34 (*emphasis added*).

166 *El-Masri v. Former Yugoslav Republic of Macedonia*, App. No. 39630/09, 2012-VI Eur. Ct. H.R. 263, ¶ 183 (2012), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115621.
*Id.*

edges that interviews are "but one method of ascertaining the facts."[167] Not all countries conduct personal interviews in the course of their election investigations. In **Mexico**, for example, oral testimony carries little weight in terms of the standard of evidence; consequently, investigators can only gather written testimony and can even face charges of harassment for conducting an oral interview.[168]

However, since interviews can serve as a valuable investigative tool, most states give investigators the discretion to interview. In the **United Kingdom**, the Electoral Commission encourages police officers investigating electoral offenses to "invite" relevant parties for an interview.[169] In a recent report on an political finance investigation, the U.K. Electoral Commission noted that all interviews were voluntary but the one person who declined sent a written response.[170] In **South Africa**, the Election Commission may afford interested parties the opportunity to make additional "oral submissions" when investigating objections to election results.[171] Likewise, **Indonesia** allows investigators to decide whether or not to interview: "In the process of investigating the Report of Suspected Violation, Election Supervisor *may* summon the Report Submitter, the reported, the party suspected to perpetrate the violation, witnesses, and/or experts to provide their testimony and/or clarification under oath."[172]

As the Indonesian law highlights, there are different categories of potential interviewees. These include the complainant (the individual alleging an election violation), the suspect or subject (the individual accused of an election violation), and witnesses (any other individuals who "may have

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167 Comm'r of Canada Elections, *Ch. 11 Interview Techniques*, in Investigators' Manual 1 (2000) [hereinafter Canadian Investigators' Manual Ch. 11].

168 Chad Vickery & Erica Shein, IFES, Mexico Elections 2012: An Assessment of the Investigation and Adjudication of Election Complaints 22 (July 2012) (unpublished report) (on file with IFES); Email from Mexican Legal Specialist, Democracy Building International (Jun. 26, 2013, 12:28 EST) (on file with IFES).

169 Electoral Comm'n, Guidance on Preventing and Detecting Electoral Malpractice 32 (2013) (U.K.).

170 Electoral Comm'n, Investigation: UK Independence Party (UKIP) (2018), https://www.electoralcommission.org.uk/our-work/roles-and-responsibilities/our-role-as-regulator-of-political-party-finances/sanctions/report-on-an-investigation-into-the-uk-independence-party-ukip.

171 Election Regulations of 2004, GN R12 in *GG* 25894, ¶ 31(2) (Jan. 7, 2004) (S. Afr.).

172 Bawaslu Regulation Concerning the Procedure of Reporting and Handling of Violations in the Elections of Members of the People's House of Representatives, House of Regional Representatives, and Regional People's House of Representatives, Law No. 14/2012 (2012), art. 15(1) (unofficial IFES translation) [hereinafter Bawaslu Regulation No. 14/2012] (*emphasis added*).

knowledge of facts, opinion, belief, information or evidence related to the investigation").[173] Investigators may need to differentiate between these categories when deciding whether or not to interview a particular individual. In some cases, it may not be necessary to interview a complainant, especially if the initial complaint must already contain "a clear, precise, and detailed" account of the underlying facts, as in **Costa Rica**.[174] On the other hand, **Bhutan's** *Election Dispute Resolution Manual* cautions investigators to question all witnesses in order to avoid missing pertinent facts.[175]

In short, states should allow investigators to use their discretion to determine whether or not individuals should be interviewed during the course of an election investigation. In systems that allow interviews and when investigators are well trained and prepared to conduct and accurately record the interviews, conducting interviews can be considered a best practice because it provides the arbiter with direct testimony from relevant and critical sources.

### *Preparing for Interviews*

According to the Canadian *Special Investigators' Manual*, developing written questions is "[t]he most important aspect of a successful interview."[176] Prior to an interview, investigators should prepare a set of written questions to guide the conversation. A written interview plan provides a framework for questioning and also allows investigators to best assess the evidence by compelling

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173 *See* Comm'r of Canada Elections, *Ch. 7 Official Cautions*, in Investigators' Manual 1–20 (2000) [hereinafter Canadian Investigators' Manual Ch. 7] (defining "witness" in the context of an election investigation). N.B. on terminology: Different sources use these terms in different ways. The UNDP Investigation Guidelines, for example, use "witness" as a synonym for interviewee. United Nations Dev. Programme, Office of Audit & Investigations, Investigation Guidelines ¶ 11.3 (Jul. 1, 2010) [hereinafter UNDP Investigation Guidelines 2010] (broadly defining witnesses as "individuals making the allegation; victims of the alleged act; individuals with direct or indirect knowledge of anything relevant to the investigation; individuals with good knowledge of business processes related to the alleged act; or experts"). Similarly, "subject" can refer to either an interviewee generally or to a suspect. *Compare* Christopher D. Hoffman, Int'l Found. for Protection Officers, Investigative Interviewing: Strategies and Techniques 2 (2005), http://www.ifpo.org/wp-content/uploads/2013/08/interviewing.pdf (using "subject" to mean any interviewee) *with* Uniform Guidelines 2009, *supra* note 25, ¶ 37, n. 8 (using "subject" as synonymous with "suspect"). For clarity, throughout this section, we use "interviewee" to refer to any individual who is interviewed by an election investigator. Where it is necessary to specify further, we use "witness" as defined in the text above, "complainant" to indicate an individual submitting an allegation of election violation, and "suspect" to refer to an individual suspected of committing an election violation.

174 Ley No. 8765, Código Electoral [Electoral Code], tit. V, ch. VIII, art. 267, La Gaceta, Diario Oficial [L.G.], 2 Sept. 2009; *accord* Bhutan Election Dispute Settlement Manual, *supra* note 27, ¶¶ 6.4–6.5. ("It may not be necessary to question the complainant as a witness if the facts of the case are clearly mentioned in the complaint letter. On the other hand, the complainant may be questioned in case there are some issues and facts which need to be verified or corroborated further.").

175 Bhutan Election Dispute Settlement Manual, *supra* note 27, ¶ 6.9.

176 Canadian Investigators' Manual Ch. 11, *supra* note 168, at 10; *accord* Ralph Crenshaw, Stuart Cullen, & Tom Williamson, *Investigative Interviewing: Best Practice in Questioning Witnesses and Suspects*, in Human Rights and Policing 254, 251–258 (2d ed., 2007) (discussing a "written interview plan" as an "important element" of the interview process).

them to consider the possibility of conflicting accounts or gaps in information in advance.[177] EMBs or other responsible authorities can create a standardized set of questions to assist investigators but investigators should always tailor the questions for each interview. Prior to an interview, investigators should also gather any relevant documents necessary for the discussion.[178]

### Questioning and Taking Statements

An investigator should create an atmosphere wherein the witness can talk freely. If a witness is literate, she/he should be allowed to write the Statement herself/himself. In case the witness is illiterate the Statement can be written by a person of his or her choice or as a last resort a member of the Investigation Committee can write the Statement but it must be read out to the witness in front of a witness of his/her choice. Only after affirmation by the witness, should the witness be allowed to affix his/her signature on the Statement and the witness of choice should be required to sign at the bottom of the Statement that the document was read out and affirmed before being signed. A Statement written by the witness himself/herself should be examined before his/her signature is affixed, as it is possible the witness may verbally state many facts when questioned by the investigator but may not put down all the relevant facts in the written Statement.

The best option for an investigator is to ask relevant questions and then simultaneously note it down. When all the facts are noted on a paper, the investigator has to make it amply clear to the witnesses on the contents before appending the necessary signatures.

From Election Commission of Bhutan, Election Dispute Settlement Manual

## *Documenting Interviews*

During the interview, investigators should take a statement from interviewees. In fact, such a statement has been described as the "most important part of the

177 Crenshaw, Cullen, & Williamson, *supra* note 177.

178 *See, e.g.*, Michael Volkov, *Best Practices for Internal Investigation Interviews*, JD Supra (Feb. 26, 2013), http://www.jdsupra.com/legalnews/best-practices-for-internal-investigatio-69777/ ("[D]ocuments are invaluable tools for investigators when conducting interviews. They constrain the witness' ability to fabricate or mislead. In many cases, they provide the boundaries for truth.").

interview" because it provides a firsthand account of the interviewee's testimony.[179] There are several different ways in which statements can be taken:

1. The investigator can direct the interviewee to write down his or her own statement in a free narrative format.
2. The investigator can take the statement in a guided narrative format, proceeding through the interview point-by-point and asking the interviewee to write down their statement as they go along.
3. The investigator can opt to use a question and answer format, particularly if the interviewee is illiterate. Canadian election investigators often use this method.[180]In this approach, the investigator notes the interviewee's answers directly onto the list of written questions, like filling in a worksheet, and adopts this record as the statement. The interviewee (or the investigator, if the interviewee is illiterate) then reads through the statement to confirm its completeness and makes changes if needed.[181]

Regardless of the chosen method, it is considered good practice for the investigator, the interviewee, and any other individuals present to sign and date each page of the completed statement as a way of acknowledging its accuracy. Video and audio recordings can also be used.

As demonstrated in the text box on the previous page, **Bhutan's** *Election Dispute Resolution Manual* addresses many of these considerations.

As the *Uniform Guidelines on Investigations* make clear, all investigative activity should be documented in writing.[182] Human rights standards for police investigations further specify that police officials should "keep a detailed record of all interviews conducted."[183] Therefore, election investigators must take care to thoroughly document the interview process before, during, and after the interview itself so that they can later rely on a definitive and in-depth record when formulating their findings. Investigators should engage

179 Christopher D. Hoffman, Int'l Found. for Protection Officers, Investigative Interviewing: Strategies and Techniques 15 (2005), http://www.ifpo.org/wp-content/uploads/2013/08/interviewing.pdf; *see also* Canadian Investigators' Manual Ch. 11, *supra* note 168, at 32–33 (explaining the importance of a witness statement).

180 *Id.* at 34.

181 *See generally* Canadian Investigators' Manual Ch. 11, *supra* note 168, at 15–17.

182 Uniform Guidelines 2009, *supra* note 25, ¶ 35.

183 Human Rights Standards and Practice for the Police, *supra* note 111.

in "factual, accurate, complete and prompt note taking."[184] **Canada** provides its election investigators with comprehensive guidance on notetaking and its recommendations can serve as an exemplary model for other states.[185]

Note-taking, videotaping, and electronic recording of interviews and interrogations has become increasingly common in police investigations in recent years.[186] The *Uniform Guidelines for Investigations*, however, do not mandate this practice and even countries with well-developed, well-resourced electoral investigations have not adopted it in the election context. At the same time, the **Canadian** *Special Investigators' Manual* recognizes that "[w]hile it is not a practice presently in use…, neither is it rejected as a valid investigative tool."[187] Many of the benefits of recording police interrogations can also apply to the recording of interviews during an election investigation. For instance, recordings increase public trust in police conduct because they emphasize that the police have nothing to hide.[188] Similarly, recording the interview can promote confidence in the integrity of the investigative process. If an investigator decides to videotape an interview, he or she should subscribe to the same set of best practices increasingly adopted for the electronic recording of police interrogations. For example, an investigator should consider asking for interviewee consent and should not continue videotaping if an interviewee objects.[189]

As previously discussed, election investigators have a duty to determine substantiated facts. Hence, during an interview, it is essential for investigators to distinguish between facts, opinions, and hearsay.[190] By "attempting as

184 Investigators' Manual Ch. 11, *supra* note 168, at 12.

185 Canadian Investigators' Manual Ch. 11, *supra* note 174, at 12.

186 The International Association of Chiefs of Police (IACP)—the world's oldest and largest association of police executives, with more than 19,000 members in 89 countries—has endorsed the practice; *see generally* Gregory DeClue & Charles Rogers, *Interrogations 2013: Safeguarding Against False Confessions*, 79 The Police Chief 42 (2012) (discussing IACP's endorsement of electronic recording).

187 Canadian Investigators' Manual Ch. 11, *supra* note 168, at 14–15.

188 *See generally* Thomas P. Sullivan, Andrew W. Vail, & Howard W. Anderson III, *The Case for Recording Police Interrogations*, 34 Litig. 1, 4 (2008), http://www.wahltek.com/pdf/WahlTek-iRecord-Litigation-Magazine-2008-05.pdf.

189 *See generally* Thomas P. Sullivan, Ctr. on Wrongful Convictions, Police Experiences with Recording Custodial Interrogations (2004), http://mcadams.posc.mu.edu/Recording_Interrogations.pdf (discussing these standards with respect to police interrogations); *cf.* UNDP Investigation Guidelines 2010, *supra* note 173, ¶ 11.8 ("When using video or audio recording devices, the subject must be advised that the interview is being recorded . . . .").

190 *Cf.* UNDP Investigation Guidelines 2010, *supra* note 173, ¶ 11.7 (obligating the investigator to find out, during the interview, and to include in the interview a record of "whether the information is firsthand knowledge or hearsay").

much as possible to use the actual words spoken by the subject" when taking interview notes, investigators can later differentiate more easily between facts and opinions.[191] The United States Department of Justice also recommends to its investigators that they label a statement as either a fact or an opinion in the margin of their interview notes.[192] By adopting techniques like this, election investigators can ensure that opinions and hearsay do not form the basis of subsequent investigative findings.

In addition to thoroughly documenting the process before and during the interview, investigators should also prepare a post-interview report. At a minimum, the report should contain basic contextual information, including the date, place, and time of the interview as well as a list of all individuals in attendance. The Commissioner of Elections **Canada** provides investigators with an interview coversheet that contains blank spaces for recording all necessary information.[193] Investigators can then append their notes, witness statements, and any other additional documents directly to this standardized cover page for safekeeping. Similarly, **Indonesian** regulations provide investigators with a model form for reporting interview results.[194]

### *Conducting Interviews*

As well-established international guidelines outline, interviews with suspects should generally be conducted by two investigators.[195] The Canadian *Special Investigators' Manual* aptly describes the rationale underlying this standard.[196] A second investigator can help assess the character and credibility of the interviewee and the reliability of the evidence and each investigator can corroborate the other's account with an "independent, verifiable and accurate record of the interview."[197] Drawing an analogy to police interrogations, it is

191 *Id.* ¶ 11.5.

192 U.S. Dep't of Justice, *Guidelines on Interviewing Techniques (Tab 18)*, in Investigation Procedures Manual for the Investigation and Resolution of Complaints Alleging Violations of Title VI and Other Nondiscrimination Statutes (1998), http://www.justice.gov/crt/grants_statutes/tab18.php.

193 *See* Canadian Investigators' Manual Ch. 11, *supra* note 168, at 37.

194 Bawaslu Regulation No. 14/2012, *supra* note 173, art. 15(2) (requiring that the interview testimony be "formalized into a Formal Clarification Report using the Model B.8-DD form").

195 Uniform Guidelines 2009, *supra* note 25, ¶ 3; *accord* UNDP Investigation Guidelines 2010, *supra* note 173, ¶ 11.1; *cf.* Rep. of the Joint Inspection Unit, Investigations Function in the United Nations System, ¶ 46, U.N. Doc. A/67/140; GAOR, 67th Sess. (Jul. 13, 2012) ("Most investigation procedures call for two investigators to interview.")

196 *See* Canadian Investigators' Manual Ch. 11, *supra* note 168, at 17–18.

197 *Id.* at 17.

also recommended that two investigators conduct an interview in the event that it is videotaped or recorded.[198]

For interviews with complainants and other witnesses, the number of interviewers generally "depends on the nature and the circumstances of the case."[199] States should carefully consider the "cultural context, gender and other elements of the case" to determine whether the situation warrants the presence of two investigators.[200] For example, to avoid any appearance of impropriety, an investigator should not interview a witness of the opposite sex alone.[201] Familiarity with language or dialect is also an important element to consider. Some situations might require the presence of additional individuals, such as a witness's family member,[202] an interpreter,[203] or a field security officer.[204] **Bhutan's** *Election Dispute Resolution Manual* highlights the importance of this practice in certain cultural contexts. "In some villages, villagers may be apprehensive while talking to strangers," the manual instructs investigators. "It may be necessary to have a local *Midhey Gothrip* [local spiritual leader]…as some witnesses in the rural areas will only talk to the investigators in their presence." To maintain the appearance of fairness

198 *Cf.* William A. Geller, Nat'l Inst. of Justice, Videotaping Interrogations and Confessions 8 (1993), https://www.ncjrs.gov/pdffiles1/Digitization/139962NCJRS.pdf ("Most commonly, two detectives are present during the videotaping of a suspect's interview.").

199 Uniform Guidelines 2009, *supra* note 25, ¶ 37, n. 8. (clarifying that "interviews of subjects should be conducted by two investigators," but "for interviews of complainants, witnesses and other persons, the number of interviewers depends on the nature and the circumstances of the case"); *accord* UNDP Investigation Guidelines 2010, *supra* note 173, ¶ 11.1 ] ("Interviews of investigations should be conducted by two investigators. With respect to interviews of investigation participants, the number of interviewers depends on the nature and the circumstances of the case.").

200 UNDP Investigation Guidelines 2010, *supra* note 173, ¶ 11.1; *cf.* Christopher Haney & Andrea Roller, Duff & Phelps, Investigative Interview Techniques 3 (2012), http://www.duffandphelps.com/SiteCollectionDocuments/Services/DLMC/DP122031_Investigative%20Interview%20Tech_v01.pdf ("To maximize rapport, consider which personnel should conduct the interview. Demographic factors, such as age or sex, may be appropriate considerations as well as potential similarities in background or socioeconomic status.").

201 *See* Canadian Investigators' Manual Ch. 11, *supra* note 168, at 2; *cf.* Hoffman, *supra* note 180 ("If an interviewer is meeting with someone of the opposite sex having a witness [observer] of the same gender as the subject is a good idea.").

202 *See* UNDP Investigation Guidelines 2010, *supra* note 173, ¶ 11.2 (the UNDP Investigation Guidelines allow investigation subjects to request the presence of an immediate family member at their interview, provided that the family member "is not involved with the investigation and is readily available").

203 The Uniform Guidelines for Investigations provide that "interviews may be conducted in the language of the person being interviewed, where appropriate using interpreters." Uniform Guidelines 2009, *supra* note 25, ¶ 38. Several countries make accommodations for language barriers in the context of election investigation interviews. *See, e.g.*, Canadian Investigators' Manual Ch. 11, *supra* note 168, at 7 (directing the investigator to make arrangements "if the witness wishes to be interviewed in a language other than that of the interviewer").

204 *See* UNDP Investigation Guidelines 2010, *supra* note 173, ¶ 11.2 (noting that investigators may request field security officers to attend the interview).

and to help corroborate the written record, we recommend that two investigators are present during interviews.

### *Additional Considerations for Interviews*

There are a number of other well-defined best practices in investigative interviewing,[205] all of which can be extended to the electoral investigation process. Some additional considerations for conducting interviews in the course of election investigations are:

i. ***Interviewers must act ethically and professionally at all times.***

There is an international consensus that investigative interviewing should emphasize the search for truth and the collection of complete, accurate, and reliable information.[206] Above all, interviews should be non-accusatory.[207] Unlike interrogations—characterized by confrontational and accusatory questioning of suspects—interviews are simply conversations intended to elicit information.[208] Thus, interviewers have a particular obligation to act ethically and professionally at all times. They should never resort to coercive or deceitful interview techniques and they should treat interviewees with respect and empathy.

ii. ***Investigators should hone their communication skills.***

As one expert from the International Foundation for Protection Officers succinctly states: "The core of interviewing is communication."[209] Current best practices in investigative interviewing, for example, favor the use of open-ended over close-ended questions. Best practices also specifically emphasize the importance of non-verbal communication. Behavioral cues such as posture, movement, and gestures can help a skilled investigator assess the truthfulness of an interviewee.[210]

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205 *See generally*, *e.g.*, Brian Ord et al., Investigative Interviewing Explained (LexisNexis, 3rd ed. 2011) (providing a step-by-step practical reference book for best practices in investigative interviewing).

206 International Developments in Investigative Interviewing 2 (Tom Williamson, Becky Milne & Stephen P. Savage, eds., 2009); *accord* Becky Milne & Martine Powell, *Investigative Interviewing*, in The Cambridge Handbook of Forensic Psychology 208 (Jennifer M. Brown & Elizabeth A. Campbell, eds., 2010) (noting that "the common objective of all investigative interviews is to elicit the most *accurate*, *complete* and *detailed* account from the interviewee" [*emphasis added*]).

207 Hoffman, *supra* note 180, at 1.

208 For more on the difference between interviews and interrogations, *see, e.g.,* Crenshaw, Cullen, & Williamson, *supra* note 177.

209 Hoffman, *supra* note 180, at 7.

210 *See generally* Haney & Roller, *supra* note 201, at 7.

iii. ***Investigators must abide by any laws regarding interviews and, if required, must inform interviewees of their rights.***

Investigators should take care to heed any legal warnings for interviewees that may be required by domestic law—particularly with respect to election crimes. In many interview settings, investigators must inform interviewees of certain rights, like the right against self-incrimination or the right to counsel, and they must clearly disclose how evidence uncovered during the interview could later be used in court. In the **United States**, for example, law enforcement officers must offer *Miranda*[211] warnings prior to interrogation in police custody. Similarly, in the election context, the **Canadian** *Special Investigators' Manual* instructs investigators on giving "official cautions."[212] By providing any necessary legal warnings, investigators can ensure that their interview findings prove admissible in court later on, providing valuable evidence for the arbiter to adjudicate the election dispute.

## Analyzing Evidence and Presenting Findings

Proper analysis of evidence includes both inculpatory and exculpatory evidence,[213] along with a formal written report to the relevant authorities that presents substantiated findings and recommendations. Once investigators have gathered and substantiated all evidence through interviews, document collection, and other means, they "*must consider* the evidence presented."[214] As the Supreme Court of the **Philippines** noted, evidence becomes "conspicuously futile if the person or persons to whom the evidence is presented can thrust it aside without notice or consideration."[215] Because "administrative decisions against a person must be fully justifiable,"[216] investigators have

211 Miranda v. Arizona, 384 U.S. 436, 494 (1966) (declaring that whenever a person is taken into police custody, before being questioned, they must be told of their right under the Fifth Amendment to the Constitution not to make any self-incriminating statements).

212 *See generally* Canadian Investigators' Manual Ch. 7, *supra* note 174, at 1–12.

213 Exculpatory evidence is favorable to the defendant and evidence favorable to the plaintiff or claimant is inculpatory.

214 *Ang Tibay v. Court of Industrial Relations*, G.R. No. L-46496 (S.C., 1940) (Phil.), http://www.lawphil.net/judjuris/juri1940/feb1940/gr_l-46496_1940.html (*emphasis in original*).

215 *Id.* (*quoting Edwards v. McCoy*, 22 Phil. Rep. 598 [S.C., 1912]).

216 Organization for the Security and Co-operation of Europe, Document of the Copenhagen Meeting on the Conference on the Human Dimension of the CSCE ¶ 5.11 (1990), http://www.osce.org/odihr/elections/14304.

the responsibility to thoroughly analyze all available information.[217] Then, the "results and reasons for decisions" and the recommendations "must be formally adopted" and "issued in written form" to the appropriate authorities.[218]

According to the United Nations General Assembly, "concealing evidence and/or burying the findings" represents the "worst case scenario" for investigations.[219] Instead, as the UNDP *Investigation Guidelines* makes clear, "[investigative] findings should follow an objective assessment of all information, including inculpatory and exculpatory evidence, gathered in the course of the investigation."[220]

What exactly does a proper analysis of evidence entail? The European Court of Human Rights offers some guidance in *Atakishi v. Azerbaijan*. In that case, the Court held that the domestic authorities' disqualification of an applicant's candidacy "was based on irrelevant, insufficient, and inadequately examined evidence."[221] The domestic authorities relied on several accusatory statements to disqualify the applicant but these "were all very vaguely worded and essentially contained unsubstantiated allegations."[222] The Azerbaijani authorities, the Court admonished, "failed to verify the identities of the authors of these complaints, to seek more detailed information from them as to the specific alleged misconduct by the applicant, to corroborate that information with any additional evidence, or to hear any of the complainants in person and thus give the applicant an opportunity to defend himself against their allegations."[223] Moreover, they "failed to identify and seek to hear any witnesses of the alleged incident in order to verify the statements."[224] The *Atakishi* case suggests that, at a minimum, proper analysis of evidence requires good faith

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217 *See* Uniform Guidelines 2009, *supra* note 25, ¶ 19. ("The Investigative Office should examine both inculpatory and exculpatory evidence."). Inculpatory evidence is evidence that tends to show an individual's involvement in an alleged act, or points toward guilt. Conversely, exculpatory evidence tends to show that an individual did not participate in the alleged act or points toward innocence.
*Atakishi v. Azerbaijan*, App. No. 18469/06, Eur. Ct. H.R. ¶ 47 (2012).

218 OSCE Office of Democratic Insts. & Human Rights (ODIHR), Existing Commitments for Democratic Elections in OSCE Participating States ¶ 10.5 (Oct. 2003), http://www.osce.org/odihr/elections/13957.

219 Rep. of the Joint Inspection Unit, Investigations Function in the United Nations System, ¶ 35, U.N. Doc. A/67/140; GAOR, 67th Sess. (Jul. 13, 2012).

220 UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 2.

221 *Atakishi v. Azerbaijan*, App. No. 18469/06 Eur. Ct. H.R., at 47 (2012).

222 *Id.* ¶ 44.

223 *Id.*

224 *Id.* ¶ 45.

verification and corroboration of information.

Very few countries provide election investigators with guidance for conducting proper analysis of evidence. **Canada**, however, specifies a list of criteria that Special investigators should consider when conducting the inspection, review, and analysis of documentary records.[225] For instance:

- Is the recorded information sufficient, reliable, and substantial enough to either prove or refute the allegations of the complainant?
- Does the recorded information comply with relevant provisions of the electoral laws?
- Does other evidence corroborate the documents?
- Are there explanations for apparent omissions, discrepancies, anomalies, or irregularities?
- Do the records appear to contain any false, deceptive, or misleading information?

All investigators can ask themselves similar questions when examining evidence. Moreover, investigative bodies should take steps to develop and disseminate comparable guidelines in order to ensure that investigators understand how to properly analyze evidence.

## Reporting, Referral, and Notification

Investigators must present their findings and recommendations in a formal final report, regardless of the outcome of the investigation, and they must refer substantiated complaints to appropriate authorities. According to the *Uniform Guidelines for Investigations*: "[I]f the Investigative Office does find sufficient information to substantiate the complaint, it will document its investigative findings and refer the findings to the relevant authorities."[226] The UNDP OAI *Investigation Guidelines* provide a general example of this process at work.[227] If evidence obtained during investigation does not substantiate the allegations, then UNDP investigators must prepare a so-called Closure Report—an internal document that does not recommend any further disciplinary or administrative action. Subsequently, investigators notify the

225 *See* Canadian Investigators' Manual Ch. 10, *supra* note 151, at 2.

226 Uniform Guidelines 2009, *supra* note 25, ¶ 42.

227 *See* UNDP Investigation Guidelines 2012,*supra* note 6, ¶ 8.3.

complainant and the subject through a letter that the investigation has been closed. If, however, the investigation "reveals adequate evidence to reasonably conclude that wrongdoing has occurred,"[228] then investigators prepare an Investigation Report. This report outlines "the allegations, the investigation methodology and the facts established in the investigation."[229] Investigators forward the report to the appropriate supervisor for further action. It is important to remember that the adjudicator should be the one that makes a final determination on the veracity of a case.

Many states have adopted a similar structure for election investigations, although the final authority to decide on whether to proceed with prosecuting or hearing the complaint generally lies with the prosecutor or adjudicator. In the **Philippines**, for example, the COMELEC *Rules of Procedure* lay out the process for presenting the findings. According to the rules governing the prosecution of election offenses: "If an investigating officer finds no cause to hold the respondent for trial, he shall recommend dismissal of the complaint."[230] Conversely, if the investigator "finds cause to hold the respondent for trial, he shall prepare the resolution, and the corresponding information wherein he shall certify under oath that he has examined the complainant and his witnesses" and "that there is reasonable ground to believe that a crime has been committed"[231] or that an administrative or civil complaint has merit. In either case, the investigator must forward his recommendation to either the Director of the COMELEC Law Department or to the State Prosecutor or City or Provincial Fiscal.[232]

In **Bhutan**, the *Election Dispute Settlement Rules and Regulations* require the Investigation Committee to "submit its findings with recommendations to the [Election Dispute Settlement] Bodies" using a standardized report form.[233] The *Election Dispute Settlement Manual* further specifies the elements that an investigation report must include, as set out in the text box on the next page.[234]

228 *Id.* at 12.

229 *Id.*

230 COMELEC Rules of Procedure, Rule 34, § 8(a) (Phil.).

231 *Id.*

232 *See Id.*

233 Bhutan Election Dispute Settlement Rules and Regulations, *supra* note 28, ¶ 13.4.

234 Bhutan Election Dispute Settlement Manual, *supra* note 27, ¶ 8.1

### 8. Investigation Report

8.1. While an investigator may have a different technique of writing an investigation report, it is vital to include all the following aspects in the report:

- Mention how the complaint was received, stating when the complaint was made, to whom, and the alleged violation of law;
- Who investigated;
- Issue or complaint to be proved and disproved;
- Findings of the investigation;
- How the findings are proving or disproving the complaint; and
- Suggest what action should be taken or not.

From Election Commission of Bhutan, Election Dispute Settlement Manual ¶ 7 (Mar. 9, 2013)

**Indonesia** also provides investigators with a standardized form for submitting the final report.[235] Based on the results of an investigation, investigators categorize a case in one of three ways: "not an electoral violation," "an electoral violation" (a violation of the Code of Ethics, a violation of election administration, or an electoral crime), or "an electoral dispute."[236] Investigators then send the final report to the appropriate authorities based on the categorization of the case.[237] In certain civil law countries, facts are often documented in an administrative record by a rapporteur or relevant agency and this record is submitted to the court.

As the Philippines, Bhutan, Georgia, and Indonesia demonstrate, investigators have the primary responsibility to present their findings and recommendations to appropriate higher-level authorities. This mechanism ensures that a complaint is either promptly resolved through the closure of the investigation or that it proceeds to adjudication in a timely manner. However, as the *Uniform Guidelines for Investigations* dictate, investigators also have a duty

235 *See* Bawaslu Regulation No. 14/2012, *supra* note 173, art. 16(1).

236 *Id.*

237 *See generally id.* ch. IV (Follow-Up of Handling Suspected Violation). Violations of the Code of Ethics, for example, are sent to the Honorary Council of Election Management Bodies (DKPP), ¶ art. 17(1), while suspected electoral crimes are sent to the National Police Force, *id.* art. 19(1).

to inform the relevant parties of their findings. Regardless of the outcome of the investigation, complainants have "the right to be promptly and officially informed of the decision taken."[238]

The decision of the **South African** Electoral Court in *Mvelase and Another v. Electoral Commission and Others* illustrates the importance of informing parties of investigative findings.[239] In that case, the petitioners—two political parties—contested the results of a by-election. In response to one party's application for the invalidation of election results, the Electoral Commission sent a short letter indicating that it had "decided to proceed with the investigation of the incidents complained of." The "cryptic" letter "lured the appellants… into thinking the decision was outstanding pending investigation." When the petitioners failed to hear back from the Electoral Commission, they appealed to the Electoral Court, only to discover that the time limit for the appeal had already passed. Simply by ceasing all communication, the Electoral Commission argued, it indicated that it had decided to discontinue the investigation and reject the complaint. The Electoral Court disagreed: "The long delay and the failure to make a decision and to communicate the result in clear terms to the appellants," the Court concluded, "frustrated…the processes open to the appellants."[240]

## Record-Keeping and Document Retention

International investigative standards repeatedly emphasize the importance of record-keeping and document retention and management. Investigative bodies have the responsibility to "develop standardized procedures for the recording of information during investigations"[241] and to "maintain and keep secure an adequate record of the investigation and the information collected."[242] This section considers each of these issues in turn.

### *Accurate Record-Keeping*

Investigators must keep accurate written records throughout the entire in-

238 Conf. on Sec. & Co-operation in Eur. (CSCE), Concluding Document of Vienna: The Third Follow-Up Meeting ¶ 13.9 (Jan. 19, 1989).

239 *Myelase and Another v. Electoral Commission and Others* 2009 (1) ZAEC 2 (Jan. 1, 2009) (S. Afr.).

240 *Id.*

241 Human Rights Standards and Practice for the Police, *supra* note 111.

242 Uniform Guidelines 2009, *supra* note 25, ¶ 20.

vestigation.[243] As previously discussed, investigators have the responsibility to record the preliminary assessment, to document any interviews they conduct, and to detail their investigative findings in a final report. Any other stages of the investigation should be similarly well-documented. For example, in **Liberia**, the Hearing Procedure clearly states that "all proceedings before the National Election Commission shall be documented."[244] The Clerk of the Hearing Office/Magistrate is specifically designated as being responsible for keeping records.

In **Indonesia**, the EMB regulations governing the investigation of certain electoral violations mandate formal reporting requirements at every step of the investigative process.[245] To satisfy this requirement, the legislation provides standardized forms for the submission of complaints, specifying different forms for different categories of complaints,[246] and requires that the receiving officer logs all complaints in a registry book.[247] After the complaint is categorized, officials must then complete a specific accompanying form every time that the complaint proceeds to a different level of investigation and review.[248] These legal requirements ensure a uniform paper trail that chronicles each phase of the investigation, from the initial receipt of the complaint to its resolution.

In **Bhutan**, the *Election Dispute Settlement Rules and Regulations* likewise provide forms that facilitate the recording of every step in the dispute resolution process.[249] The regulations first provide a form for the submission of complaints.[250] Prior to the initiation of an investigation, the Legal Unit of the Central Election Dispute Settlement Body (CEDSB) uses another form to maintain a case register.[251] At the conclusion of the investigation, the investi-

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243 *See Id.* ¶ 35("Investigative Activity . . . should be documented in writing . . . .").

244 Liberia, National Election Commission, Hearing Procedure ¶ 7.3.

245 *See* Bawaslu Regulation No. 14/2012, *supra* note 173, art. 15(1).

246 *Compare id.* art. 4 (specifying the types of forms to be used when the Election Supervisor submits a complaint of a suspected violation) *with id.* art. 9 (specifying the types of forms to be used for all other complaints, including those submitted by election observers, participants, or any other Indonesian citizen).

247 *Id.* art. 9(6).

248 *See generally id.* ch. IV (Follow-Up of Handling Suspected Violation).

249 *See generally* Bhutan Election Dispute Settlement Rules and Regulations, *supra* note 28.

250 *Id.* ¶ 9.3.5 ("An election complaint must . . . be in writing and cover all points as in Election Dispute Settlement Form No. 1.").

251 *Id.* ¶ 10.5 ("The Legal Unit shall . . . maintain a Case Register, as in the Election Dispute Settlement Form No. 3.").

gators report their recommendations and findings on another standardized form.[252] There are several additional forms for the remainder of the resolution of the dispute, including a notice for hearing,[253] the appointment of a lawyer for the administrative hearing,[254] the decision,[255] and the acknowledgement of the decision.[256]

### *Document Retention and Records Management*

As they document all stages of the investigative process, investigative bodies need to effectively manage and maintain all information they create and receive. This involves designing an information and records management policy that covers the filing of documents, archiving, and disposal of information. Accurate document retention and records management has many benefits for investigators. As the *Generally Accepted Recordkeeping Principles* (discussed below) attest: "Complete and accessible records and information in a well-managed environment minimize inconsistent and erroneous interpretation of the facts, simplify legal processes and regulatory investigations, and protect valuable information."[257]

Accurate document retention and records management facilitate the day-to-day operations of the election investigation, ensure compliance with the given national regulatory environment, and allow for effective external oversight, review, and appeal. They help investigators prepare for future investigations, create the basis for institutional accountability, and allow easy reference to past activities and decisions. When the investigator refers the case to adjudicative authorities, the investigative records become important evidence necessary for reaching a final decision. Finally, accurate record-keeping,

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252 Bhutan Election Dispute Settlement Rules and Regulations, *supra* note 28, ¶ 13.4 ("The Investigation Committee shall in its report, format as in the Election Dispute Settlement Form No. 4, submit its findings with recommendations to the Bodies [the CEDSB], as the case may be.").

253 *Id.* ¶ 14.2 ("The Notice for the Hearing shall be made in writing, in the format as in the Election Dispute Settlement Form No. 5 . . . .").

254 *Id.* ¶ 15.4 ("The Political Party, Candidate or any person who is party to a case may, authorise [sic] in writing a competent person to represent it/him/her at the hearing of an election case as in the Election Dispute Settlement Form No. 6.").

255 *Id.* ¶ 19.2 ("A decision of the CEDSB . . . on an election dispute shall be presented as provided for in the format as in the Election Dispute Settlement Form No. 8.").

256 *Id.* ¶ 19.5 ("The parties shall sign the Acknowledgement of Decision on receipt of the decision as in the Election Dispute Settlement Form No. 9.").

257 ARMA Int'l, Generally Accepted Recordkeeping Principles 8 (2015), https://www.arma.org/store/ViewProduct.aspx?id=10482978.

- An organization should have reasonable policies and procedures for managing its information and records.
- An organization's information and records management policies and procedures should be realistic, practical and tailored to the circumstances of the organization.
- An organization need not retain all electronic information ever generated or received.
- An organization adopting an information and records management policy should also develop procedures that address the creation, identification, retention, retrieval and ultimate disposition or destruction of information and records.
- An organization's policies and procedures must mandate the suspension of ordinary destruction practices and procedures as necessary to comply with preservation obligations related to actual or reasonably anticipated litigation, government investigation or audit.

From the Sedona Guidelines (2007)

document retention, and records management demonstrate a commitment to accountability and transparency, increasing citizen trust in the legitimacy of the electoral dispute resolution process.

While there is no binding international law on document retention and records management, several international organizations have developed a set of voluntary standards and guidelines that have increasingly been accepted by most countries. These international guidelines are "comprehensive in scope, but general in nature," as "they are not addressed to a specific situation, industry, country, or organization."[258] Because they are intended to apply in a wide range of circumstances, these standards can be extended to the election investigations context.[259] Even in countries in which the election investigation body has little or no control over the development of its own records management policy, these international guidelines emphasize the duty to comply

258 *Id.* at 3.

259 *Cf. id.* ("The Principles are intended to set forth the characteristics of an effective information governance program, while allowing flexibility based upon the unique circumstances of an organization's size, sophistication, legal environment, and resources.").

with the national regulatory framework and to educate investigators on the importance of accurate and reliable recordkeeping.

Most importantly, the International Organization for Standardization (ISO) has published a widely accepted international standard on records management—*ISO 15489*.[260] The *ISO 15489* is used by the United Nations in its own records management system[261] and has been adopted by more than 100 national standard bodies.[262] Broad in scope, the standard covers records management in all organizations, large or small, public or private, and serves as a benchmark for best practices, providing guidance on the design and implementation of a records management system. The standard emphasizes that records should be authentic, reliable, integral or whole, and useable or useful.[263] It also stresses that a robust records system should be comprehensive and systematic, demonstrating reliability, integrity, and compliance.[264]

ARMA International, a professional association for records and information managers, espouses a similar set of standards.[265] Developed from the international records management standard, analogous national standards, and court case law, ARMA's *Generally Accepted Recordkeeping Principles* underscore that document retention and records management policies should be based on accountability, integrity, protection, compliance, availability, retention, disposition, and transparency.[266]

In the **United States**, document retention, especially the retention of elec-

260 ISO 15489-1:2001 – Information and Documentation – Records Management – Part 1: General, Int'l Org. for Standardization (2001) [hereinafter ISO 15489]. A companion standard provides additional guidance on implementation; *see* ISO/TR 15489-2:2001 – Information and Documentation – Records Management – Part 2: Guidelines, Int'l Org. for Standardization (2001). For a plain-language summary of the standard, see Johanna Gunnlaugsdottir, *An International Standard on Records Management: An Opportunity for Librarians*, Libri 52, 231–240 (2002).

261 *See* United Nations Archives and Records Management Section, Polices, Standards and Guidelines (2012), https://archives.un.org/content/our-policies-standards-and-guidelines.

262 For a complete list of the 120 countries that have adopted ISO standards nationally, see ISO Members, Int'l Org. for Standardization, http://www.iso.org/iso/home/about/iso_members.htm?membertype=membertype_MB (last visited Jan. 13, 2015).

263 ISO 15489, *supra* note 261, at 7.

264 *Id.* at 8–9.

265 *See generally* ARMA Int'l, *supra* note 258. ARMA International is the world's oldest and largest non-profit professional association for records and information management, with more than 10,000 members worldwide. It was a key contributor to the development of ISO 15489. Originally, ARMA was the acronym for the Association of Records Managers and Administrators. To reflect an expansion of the profession to information governance, the association's board of directors decided to discontinue using ARMA as an acronym and adopted "ARMA International" as a general descriptor of the association.

266 ARMA Int'l, *supra* note 258.

tronic data, has become a "hot topic" in the legal industry in recent years.[267] To address the challenges of information management in the digital age, a leading group of lawyers, jurists, and academics developed the *Sedona Guidelines*, a set of best practices for electronic record retention in the litigation context.[268] Despite their originally narrow focus, the *Sedona Guidelines* echo international standards and can inform any records retention policy,[269] including that of an election investigation body. The *Sedona Guidelines* include key elements that are noted in the box above, among others.

Finally, the United Nations Archives and Records Management Section (ARMS), in addition to complying with international standards such as the *ISO 15489*, has developed a number of additional internal protocols and guidelines. Although these are intended to inform United Nations' offices, they can also be helpful to election investigation bodies. ARMS's records and information management guidance can be used to comprehensively review existing records management strategies.[270] The *User Guide to Retention Schedule Implementation* offers generally applicable tips on document disposition, which is the final stage of records management in which the records are either destroyed or permanently retained.[271] Likewise, the *Guidelines on Records Destruction* discuss the five principles behind document disposition (authorized, appropriate, secure/confidential, timely, and documented) and provide a checklist for records destruction.[272]

As is clear from the above discussion, the international imperative to keep and manage thorough investigative records raises important questions. What

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267 LexisNexis, Elements of a Good Document Retention Policy 1 (2007), http://www.lexisnexis.com/AppliedDiscovery/lawlibrary/whitePapers/ADI_WP_ElementsOfAGoodDocRetentionPolicy.pdf.

268 The Sedona Conf ., The Sedona Guidelines: Best Practice Guidelines & Commentary for Managing Information & Records in the Electronic Age (2d ed., 2007), https://thesedonaconference.org/publication/Managing%20Information%20%2526%20Records.

269 Thomas M. Jones et al., *Going Global: Mapping an International Records Retention Strategy*, Info. Mgmt. (2008), http://content.arma.org/imm/MayJune2008/going_global_mapping_an_international.aspx (discussing how the Sedona Guidelines' best practices can serve as a foundation for any organization's records retention policy).

270 *See, e.g.*, U.N. Dep't of Mgmt. Archives & Records Mgmt. Sec., How Do I Assess the Quality of my Office's Records Systems?, https://archives.un.org/sites/archives.un.org/files/10-guidance_recordkeeping_quality.pdf (last visited May 29, 20202015).

271 U.N. Dep't of Mgmt. Archives & Records Mgmt. Sec., Guideline: User Guide to Retention Schedule Implementation (2012), https://archives.un.org/sites/archives.un.org/files/general/documents/guideline_retention_schedule_implementation.pdf ; *Record Disposition*, Business Dictionary, http://www.businessdictionary.com/definition/record-disposition.html (last visited May 28, 2020).

272 U.N. Dep't of Mgmt. Archives & Records Mgmt. Sec., Guideline on Records Destruction (2012), https://archives.un.org/content/our-policies-standards-and-guidelines.

kinds of records should be retained? How long should these documents be kept? Who will have access to them? To resolve these questions, it is critical for an election investigation body to adhere to a comprehensive document retention and records management policy. Legislations or regulations often address these requirements. Regardless of the approach adopted, investigators must abide by the relevant laws and regulations and states should take proactive steps, such as providing training, to ensure that investigators understand their legal obligations.

**Costa Rica's** extensive document retention policy, tailored specifically to the electoral context, exemplifies many of the recommended principles and standards for retention and management. To facilitate access to information, the Supreme Electoral Tribunal issued regulations establishing a Central Archive.[273] Pursuant to national legislation, it also created an Institutional Committee for the Selection and Deletion of Documents—a team of individuals responsible for populating the archive.[274] The Supreme Electoral Tribunal then issued a procedure manual that details the process the committee should use in evaluating and assessing documents and in developing tables of disposition schedules for different types of legal documents.[275]

### *Preservation of Records*

Among other things, the obligation to "keep secure" investigative records necessitates "well-designed storage processes" and a "well-managed environment."[276] The warning issued in **Costa Rican** regulations of the Central Archive of the Supreme Electoral Tribunal applies equally well to all states: "The place designated for the Central Archive should take into account the conditions necessary to guarantee optimal document preservation, among them: the humidity of the air, the temperature, pollution, light, insects, or similar situations. Additionally, there should be technological measures for extinguishing fires and preventing theft."[277]

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273 Manual de Procedimientos para la Selección y Eliminación de Documentos [Procedures Manual for the Selection and Deletion of Documents], ch. II, art. 2 (adopted in Sess. No. 44-2010, promulgated by Circ. No. STSE-0032-2010) (2010)(Costa Rica).

274 *Id.* ch. VIII, art. 13.

275 *Id.*

276 U.N. Dep't of Mgmt. Archives & Records Mgmt. Sec., Guideline on Preventing, Detecting and Treating Insect Infestation in Records and Archives Centers (2012), https://archives.un.org/content/our-policies-standards-and-guidelines.

277 Decreto No. 2-95, Reglamento del Archivo Central de Tribunal Supremo de Elecciones [Regulation on the Central Archive of the Supreme Electoral Tribunal], ch. III, art. 5, La Gaceta, Diario Oficial [L.G.] No. 206 (1995)(Costa Rica).

### Obligation to Preserve Sensitive Election Materials

Most electoral codes include a provision that requires election materials to be kept for a certain period of time—however, the duration varies by country. For instance, in Australia, electoral documents must be kept for at least six months after an election and until they are no longer needed by the Electoral Commission (Commonwealth Electoral Act, art. 393[A] [Compilation no. 63]). Ukraine, on the other hand, requires a longer period of retention because district election commissions are required to deliver election materials to local archive institutions, which must store them for at least five years after the promulgation of election results (Law of Ukraine on Election of the Peoples' Deputies, art. 115 [No. 4061/2011]). Generally, it is recommended that election materials are kept as long as it is possible to contest the results of the election and until there are final binding judgements on any existing election disputes.

## *Transparency and Privacy*

As the principle of transparency in the *Generally Accepted Recordkeeping Principles* indicates, open access to public records is an important issue in any records management strategy. The *Universal Declaration on Archives* stresses that accessible archives serve as "authoritative sources of information underpinning accountable and transparent administrative action."[278] Widespread public access to records promotes democracy and protects the rights of citizens.[279] **Costa Rica**, for example, requires that "all citizens have access to the information contained in the documents in the Archive of the Supreme Electoral Tribunal."[280] While considering the need for transparency, investigative bodies must aim to "ensure a reasonable level of protection to records and information that are private, confidential, privileged, secret, classified...or that otherwise require protection."[281] The *Generally Accepted Recordkeeping Principles* recognize that "the extent to which [records] are

278 General Assembly of the Int'l Council of Archives, Universal Declaration on Archives (Sept. 2010), endorsed by the 36th Sess. of the UNESCO General Conf. (Nov. 2011), http://unesdoc.unesco.org/images/0021/002134/213423e.pdf.

279 *Id.*

280 Decreto No. 2-95, Reglamento del Archivo Central de Tribunal Supremo de Elecciones [Regulation on the Central Archive of the Supreme Electoral Tribunal], ch. VI, art. 9, La Gaceta, Diario Oficial [L.G.] No. 206 (1995)(Costa Rica).

281 ARMA Int'l, *supra* note 258, at 5. The tension between transparency and confidentiality is further discussed in a subsequent section. *See infra* p. 60 ("Investigative bodies must balance the need for transparency with the need to protect certain pieces of information.").

available to interested parties will vary depending upon the circumstances."[282] In other words:

> An organization that is subject to open records laws may need to make all records available to any person upon request. Other organizations may have a legitimate need to protect confidential or proprietary information, and they may therefore reasonably put in place procedures designed to control access to information.[283]

The *Principles of Access to Archives*, while advocating for the "widest possible access to archives," similarly acknowledge the potential need for restrictions on "investigatory or law enforcement information."[284] In the **Philippines**, for example, where citizens have a constitutional right to information,[285] limitations to public access nevertheless include restrictions on records related to any ongoing investigation.[286]

As outlined in the *Principles of Access to Archives*, if an election investigation body finds it necessary to limit public access to certain investigative documents and records, it should "limit the scope of restrictions to those imposed by law or to identify instances where a specific harm to a legitimate private or public interest temporarily outweighs the benefit of disclosure at the time."[287] Furthermore, consistent with the general principle of transparency, it must ensure that any "restrictions and the reasons for them are clear to the members of the public."[288] Finally, restrictions must be "administered on equitable terms" and not arbitrarily.[289]

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282 *Id.* at 10.

283 *Id.*

284 Int'l Council on Archives, Principles of Access to Archives § 4 (2012), http://www.ica.org/13619/toolkits-guides-manuals-and-guidelines/principles-of-access-to-archives.html.

285 Const. (1987), art. III, sec. 7 (Phil.).

286 Nat'l Archives of the Philippines (NAP) General Circular No. 1, §§ 13–13.5.4, 105:12 O.G. 1715 (Jan. 20, 2009) ("The National Archives of the Philippines shall provide official information, records or documents to any requesting public . . . , except if: . . . It would disclose investigatory records . . . ; Interfere with enforcement proceedings; Deprive a person of a right to a fair trial or an impartial adjudication; Disclose the identity of a confidential source; Unjustifiably disclose investigative techniques and procedures . . . .").

287 Int'l Council on Archives, Principles of Access to Archives § 4 (2012), http://www.ica.org/13619/toolkits-guides-manuals-and-guidelines/principles-of-access-to-archives.html.

288 *Id.*

289 *Id.*

# PRINCIPLE 3: EFFECTIVE INVESTIGATION

**Principle:** The principle of effective investigation is directly linked to the fact that individuals must have accessible and effective remedies in place to protect their political rights. The right to an effective remedy can be undermined if the investigation process into an alleged violation is not effective.

**Practice:** Effective investigation requires:

- ✓ Clear mandates;
- ✓ Competent and professional investigators;
- ✓ Systems of accountability;
- ✓ Established codes of conduct and systems to protect against conflicts of interest;
- ✓ Maintenance of a proper chain of evidence; and
- ✓ The ability to act against bad faith, malicious, or negligent complaints.

**Chapter topics:** This chapter covers the following topics:

- ✓ Investigation mandate;
- ✓ Competence; and
- ✓ Professionalism.

**Effective investigation is** an essential component of electoral adjudication and dispute resolution. As discussed throughout this volume, in *Namat Aliyev v. Azerbaijan*, a candidate for the Azerbaijani parliamentary elections complained of electoral law violations and claimed that the elections were not effectively examined by authorities. The European Court of Human Rights found that the European Convention on the Protection of Human Rights and Fundamental Freedoms comprises procedural obligations to effectively protect the right to "free elections," namely:

> [T]he existence of a domestic system for effective examination of individual complaints and appeals in matters concerning electoral rights is one of the essential guarantees of free and fair elections. Such a system ensures an effective exercise of individual rights to vote and to stand for election, maintains general confidence in the State's administration of the electoral process and constitutes an important device at the State's disposal in achieving the fulfilment of its positive duty under Article 3 of Protocol No. 1 to hold democratic elections. Indeed, the State's solemn undertaking under Article 3 of Protocol No. 1 and the individual rights guaranteed by that provision would be illusory if, throughout the electoral process, specific instances indicative of failure to ensure democratic elections are not open to challenge by individuals before a competent domestic body capable of effectively dealing with the matter.[290]

## Investigation Mandate

### *Defined Mandate for Investigation*

A defined regime for investigation is necessary to avoid delays, prevent "forum shopping,"[291] and promote efficiency by reducing caseloads at each level. States should, therefore, institute clear rules regarding the specific subject-matter

290 Namat Aliyev v. Azerbaijan, App. No. 18705/06, 2010 Eur. Ct. H.R. ¶ 81 (2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98187 (finding a violation of Article 3 when the domestic courts failed to adequately protect the applicant-candidate's right to run for legislative office and appeal irregularities in the results and conduct of the election); *see also* Communist Party of Russia v. Russia, App. No. 29400/05 Eur. Ct. H.R ¶ 124 (2012) (reinforcing the *Aliyev* judgment with reference to the Venice Commission Code of Good Practice in Electoral Matters).

291 *See* GUARDE, *supra* note 1, at 24 (forum shopping occurs when more than one institution is an appropriate forum for investigating a claim or complaint and claimants bring the same complaint before several forums to try to obtain the most favorable ruling).

jurisdiction of each institution and these should be determined well in advance of the election.

States should specifically define the subject-matter jurisdiction of an investigative body to consider different types of complaints and the appropriate scope of investigation. The differences between administrative, civil, and criminal disputes, violations, or offenses are due to their legal character and could imply jurisdictional boundaries for an investigative body's consideration of complaints. Administrative courts or EMBs usually handle claims for which the statute or agency regulations grant them jurisdiction, while criminal courts handle claims brought by a prosecutorial body on behalf of the people of the jurisdiction. Generally, civil courts deal with all other matters that are neither administrative nor criminal (and there are many different exceptions or variations to this globally, including courts with various dedicated jurisdictions).

**Rules and regulations should define**

- Subject-matter jurisdiction and appropriate scope of investigation;
- Which bodies have original jurisdiction;
- Institutional accountability for investigative bodies to consider complaints, even where there are questions on jurisdiction;
- At which level – national, local, district – an investigative body has authority to initially process and investigate complaints.

Objections to election results, for example,[292] may fall under an administrative regulation and be pursued in an administrative court, through an EMB, or in a civil court, while alleged criminal offenses, as outlined in a state's electoral laws or criminal codes,[293] would fall to a criminal court. Administrative sanctions for wrongful conduct are typically imposed by EMBs or civil or administrative courts. There may also be instances of concurrent jurisdiction—for example, an administrative dispute over election results may also involve elements of a criminal offense.

292 Orozco-Henríquez et al., *supra* note 101, at 39.

293 *Id.* at 38.

*Grosaru v. Romania*[294] illustrates the fact that certain violations may overlap; an action can be both an electoral violation under electoral laws and/or regulations as well as a crime under the country's penal code. For example, an incident of violence committed with the purpose of intimidating a person to vote a certain way may be both an offense of intimidation under electoral laws and a crime of assault under the penal code. In such cases, the act may be sanctioned under both the electoral laws and the penal code. The level of evidence necessary for a criminal conviction can make a criminal prosecution more time-consuming, and convicting a person of a crime requires a higher evidentiary standard (generally "beyond a reasonable doubt") than sanctioning a person for an electoral offense. Conversely, there are factors that make criminal prosecution more effective: greater resources for investigation; greater penalties; the power of arrest; and the wide powers of search and seizure to obtain evidence.

In general, whether an electoral complaint alleges an administrative, civil, or criminal complaint indicates the proper jurisdiction for the investigations process. States often provide for exclusive jurisdiction to one institution, depending on the type of claim, in order to prevent any confusion on agency authority. In the **United Kingdom**, for example, police forces have the authority to investigate allegations of election fraud, corrupt practices, and other electoral law offenses .[295] When receiving a complaint or identifying a potential issue, the British Electoral Commission refers the matter to the police force's Single Point of Contact (SPOC) Officer for elections. In addition, citizens, candidates, political parties, and the media can file claims directly with the police SPOC. Other states, however, establish rules for investigations related to specific phases of the election process rather than the claim type.

In several states, election management bodies have exclusive jurisdiction, at least for preliminary investigations, over all election offenses and disputes. In the **Philippines**, for instance, the Commission on Elections has the exclusive power to conduct investigations, acting on a verified complaint or its own initiative, for all election offenses punishable under election laws and

294 *Grosaru v. Rom.*, App. No. 78039/01, 2010-II Eur. Ct. H.R. 1 (2010). *See also, Kudła v. Pol.*, No. 30210/96, 2000-XI Eur. Ct. H.R. § 158 (2000).

295 *See* Electoral Comm'n, Guidance on Preventing and Detecting Electoral Malpractice (2013) (U.K.).

to prosecute those cases as necessary.[296] **T**he Commission on Elections also exercises exclusive original jurisdiction for investigating and adjudicating all contests relating to elections, including returns and qualifications for elective regional, provincial, and city officials.[297] Likewise, in **Liberia**, the National Elections Commission has original jurisdiction for reviewing all disputes relating to results of all elections.[298]

Systems that provide concurrent jurisdiction or that permit complainants to choose among investigative bodies to which they can file complaints run the risk of duplicating investigations and stoking institutional rivalry and forum shopping.[299] In **Lebanon,** for example, several bodies have concurrent jurisdiction over investigations[300] and the absence of guidelines on the division of power among institutions produces conflicting interpretations of similar factual situations, incentivizing claimants to seek out the most favorable forum and thereby undermining the legitimacy of both investigation and adjudication.[301]

In the seminal judgment, *Aliyev v. Azerbaijan,* the European Court of Human Rights found that, in part, the lack of clarity as to which institutions should receive and consider complaints prevented effective and timely resolution of electoral disputes.[302] While the Azerbaijani Election Code envisages that most complaints are filed with the localized Constituency Election Commissions (ConECs), the law also allows for complaints to be lodged with the Central Election Commission (CEC), without any delineation as to the subject-matter

296 Const. (1987), art. IX-C, sec. 2 (Phil.); Omnibus Election Code, B.P.Blg. 881, art. VII, sec. 265 (Phil.); COMELEC Rules of Procedure, Rule 34 § 1 (Phil.).

297 Const. (1987), art. IX-C, sec. 2 (Phil.).

298 Republic of Liberia, Elections Law of 2004 § 2.9(q) (2004).

299 Robert Dahl, Electoral Complaint Adjudication and Dispute Resolution: Key Issues and Guiding Principles, Remarks at the 2008 General Assembly of the Association of Asian Election Authorities (July 22, 2008)

300 *See* GUARDE, *supra* note 1, at 24–25.; Gaelle Deriaz, The 2009 Mechanisms for Handling Electoral Complaints and Appeals in Lebanon 16 (2009) (The Lebanese complaints adjudication process involves several entities that share jurisdiction over specific elections issues. Three electoral management bodies have authority process complaints: the Ministry of Interior and Municipalities, the Supervisory Commission on the Electoral Campaign, and the Registration Committees and Higher Registration Committees. Electoral Courts also handle electoral matters and follow their separate procedures to determine subject matter jurisdiction.).

301 Autheman, *supra* note 52.

302 Namat Aliyev v. Azerbaijan, App. No. 18705/06 Eur. Ct. H.R. ¶ 55 (2010), http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98187.

jurisdiction for investigation and adjudication.[303] Hence, many candidates brought complaints directly to the CEC, bypassing ConECs. Although the CEC formally registered all such complaints, it subsequently shuttled them back to the relevant ConEC for investigation and review.[304] In addition to these jurisdictional challenges, ConECs failed to investigate or resolve received complaints in many instances, which led to allegations of institutional malpractice.[305]

Questions over subject-matter jurisdiction often result in institutional failure to take responsibility for investigations. In *Inkatha Freedom Party v. Independent Electoral Commission*, the South African Election Court held that the IEC has jurisdiction to investigate claims that are material to the result of an election despite the fact that the IEC argued that it lacked the statutory power to adjudicate electoral disputes or misconduct.[306] The Court found that, while the IEC does not have the explicit statutory authority to adjudicate alleged violations of the Electoral Code, the legal electoral framework empowers this institution to "investigate and conduct a hearing to decide an objection concerning any aspect of an election that is material to the declared result of the election."[307] The Court reasoned that "the commission is the only entity with original jurisdiction to rescind the declared result of an election. Such jurisdiction is only given to this court on appeal to it from a decision of the IEC…."[308] This case underscores the importance of defining jurisdiction prior to elections in order to avoid questions of authority, particularly with respect to claims that may determine election results.

### *Referral and Joint Investigation*

Investigative bodies and other relevant institutions—such as law enforcement agencies, election management bodies, prosecution services, and courts or tribunals—must establish communication mechanisms in advance of the election process to facilitate timely referrals and effective cooperation during investigations.

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303 *Id.*

304 *Id.*

305 *Id.*

306 *Inkatha Freedom Party v. Independent Electoral Commission* 2009 (1) ZAEC 3 at 10 (S. Afr.).

307 Namat Aliyev, App. No. 18705/06 Eur. Ct. H.R. ¶ 55 (2010).

308 *Inkatha Freedom Party,* 2009 (1) ZAEC 3 at 10.; Electoral Commission Act 51 of 1996 § 65(6)(a) (S. Afr.).

Several states, including **Moldova**, the **Philippines**, **Bhutan**, and the **United States**, require investigative bodies that hear administrative complaints to refer any claims that warrant criminal investigation to law enforcement and prosecution agencies. Established systems of referral among institutions involved in electoral investigations enable investigative bodies to identify claims that fall outside their jurisdiction and quickly transfer these complaints to the relevant institutions at the appropriate point in the investigative process. The **Moldovan** Electoral Code obligates the Central Election Commission to immediately inform prosecution agencies of "evidence that an action, which in their opinion includes elements of a crime, related to conduct of elections has been committed."[309] The regulation relating to complaints is even broader—i.e., not limited to criminal authorities—because it provides that the Moldovan electoral authority refers a complaint if it is determined that its resolution doesn't fall within its purview within two calendar days from the date of receipt. The electoral authority also has the "obligation to inform the complainant about the fact that the complaint was remitted to the body responsible for resolving it."[310]

In **Bhutan**, the Central Election Dispute Settlement Body (CEDSB) can refer complaints to law enforcement agencies that fall outside the CEDSB's jurisdiction, such as the Royal Bhutan Police or the Anti-Corruption Commission. Referrals are not permitted, however, for complaints involving reprimand, fines, or disqualification of political parties or candidates.[311] In **Ukraine**, election laws limit the investigative powers of lower-level election commissions—if they detect any signs of criminal or administrative offenses (i.e., offenses under the administrative or criminal code rather than under the election laws), either on their own or based on the complaints themselves, then they must hand the case over to the police for further investigation, instead of conducting an investigation themselves.[312]

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309 Law No. 1381-XII of 1997 (Electoral Code of the Republic of Moldova), Monitorul Oficial al R.Moldova No. 81/667 of July 12, 1997, *as amended* 2010, art. 70 (Moldova) ("Criminal Penalties . . . (2) Criminal cases for crimes described in paragraph (1) shall be pursued by prosecution bodies. (3) The chairpersons of electoral bodies and other officials are obliged to inform the prosecution bodies immediately whenever they become aware of evidence that an action, which in their opinion includes elements of a crime, related to conducting elections has been committed.").

310 Law No. 1381-XII of 1997 (Electoral Code of the Republic of Moldova), Monitorul Oficial al R.Moldova No. 81/667 of July 12, 1997, 10 (Moldova).

311 Bhutan Election Dispute Settlement Manual, *supra* note 27, ¶ 17.1. (2013).

312 Law of Ukraine No. 4061-VI (Election of the People's Deputies of Ukraine), art. 111(8) (2011).

Institutional cooperation, rather than referral, can also ensure timely adjudication of complaints, especially for challenges to election results when timely resolution is of particular importance. Prior to an election, EDR bodies should adopt a Memorandum of Understanding with relevant institutions, such as law enforcement and EMB, in order to establish focal points, to share evidence, and to ensure fast cooperation in cases in which joint investigations would result in more timely and effective results on the basis of which body has original jurisdiction, access to evidence, and access to resources needed to conduct a proper investigation.

It is important that the scope of an investigation, as well as roles and responsibilities of each institution, be clearly defined prior to joint case investigation. For instance, the Elections **Canada** Commissioner may request that the Royal Canadian Mounted Police (RCMP) participates in investigations led by special investigators.[313] The Commissioner is also permitted to refer certain complaints to the RCMP, if their investigation requires police expertise and powers of a "peace officer."[314] The Commissioner's decision concerning a joint investigation must be supported by the preliminary assessment findings, the nature of allegations, and by any reports issued during the course of investigation.[315] Through its Constitution and Election Law, **Pakistan** extends the principle of cooperation by permitting investigators to engage with institutions like the State Bank of Pakistan, National Accountability Bureau (NAB), Federal Bureau of Review (FBR), Ministry of Finance, National Database and Registration Authority (NADRA), as well as the Supreme Court or district and session courts.[316] Election investigators can also request information from civil society organizations and observation groups or use their public reports as part of their investigations.[317]

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313 Canadian Investigators' Manual Ch. 5, *supra* note 85, at 1.

314 *Id.* at 1–2 (unlike Special Investigators, peace officers have the right and duty to initiate an investigation when reasonable grounds exist to believe that an offense was committed); *see also* Criminal Code of Canada, R.S.C. 1985, c. C-46, § 2 (peace officer refers to, inter alia: "(a) a mayor, warden, sheriff, deputy sheriff, and justice of the peace; (b) a member of Correctional Service of Canada, who is designated as a peace officer . . . ; (c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process . . . .).

315 *Id.* at 2.

316 Handbook on the ECP Election Complaints Process, *supra* note 22, at 13.

317 *Id.*

## Competence

Investigative bodies should have the capacity and authority to prepare for, conduct, and complete election investigations that comport with domestic and international standards. Regardless of its structure, an investigative body should be given the authority, resources, and capacity to manage investigations in compliance with a state's legal framework and the body's operational policies and priorities, while working in the public interest and with the goal of promoting the integrity of the electoral process.[318]

Lessons can be drawn from other professions to inform the competence requirement for individual investigators. International guidelines for the competent conduct of judges, prosecutors, and lawyers include the elements of integrity and sufficient training as well as a recruitment process that is based on predetermined qualifications.[319] Similarly, the American Bar Association's *Model Rules of Professional Conduct* define competence as the "knowledge, skill, thoroughness and preparation reasonably necessary for… representation."[320] Reflecting these legal principles, the sufficient competence of an election investigator could be understood as the integrity, ability, knowledge, skill, qualification, and preparation that are reasonably necessary for a thorough and effective investigation.

The duties and responsibilities outlined in applicable electoral or administrative rules should provide the basis for an investigator's powers.[321] An

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318 *See, e.g.,* Canadian Investigators' Manual Ch. 5, *supra* note 85, at 1 ("Conduct, management, and control of investigations must be in compliance with operational policies, goals and priorities, keeping in mind the duty to act fairly, the public interest and the promotion of the integrity of the electoral process.").

319 U.N. Office of the High Comm'r for Human Rights, Guidelines on the Role of Prosecutors § 1, *adopted* (1990), http://www.ohchr.org/EN/ProfessionalInterest/Pages/RoleOfProsecutors.aspx [hereinafter U.N. Guidelines on the Role of Prosecutors] ("persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications"); *accord* Basic Principles on the Independence of the Judiciary, *supra* note 112 ("persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law"); Int'l Ass'n of Prosecutors, Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors § 1, (1999), http://www.iap-association.org/getattachment/34e49dfe-d5db-4598-91da-16183bb12418/Standards_English.aspx [hereinafter Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors] ("Prosecutors shall: at all times maintain the honour and dignity of their profession; always conduct themselves professionally, in accordance with the law and the rules and ethics of their profession; at all times exercise the highest standards of integrity and care; keep themselves well-informed and abreast of relevant legal developments; strive to be, and to be seen to be, consistent, independent and impartial; always protect an accused person's right to a fair trial, and in particular ensure that evidence favourable to the accused is disclosed in accordance with the law or the requirements of a fair trial; always serve and protect the public interest; respect, protect and uphold the universal concept of human dignity and human rights.").

320 American Bar Ass'n, Model Rules of Professional Conduct, Rule 1.1 (1983).

321 Comm'r of Canada Elections, *Ch. 2 Qualification, Duties, and Responsibilities of Investigators*, in Investigators' Manual 1–39 (2004) [hereinafter Canadian Investigators' Manual Ch. 2].

investigative body's enacting legislation and the rules and regulations that govern its operations should define the scope of investigators' work and serve to reinforce the credibility of and to promote the public confidence in the investigative process. This level of detail enables the investigative body to plan the complex operations of investigating electoral disputes.[322]

Several states incorporate competence standards for investigators into their policy frameworks, including expectations on the ability to prepare for an investigation, to collect evidence and establish the factual history of electoral claims, and to report findings. **Bhutan's** electoral rules and regulations, for instance, stipulate that investigators should be able to establish the truth of a claim in a lawful manner and must possess "fair knowledge on all aspects, such as, the cause of action, place of occurrence of the event, the identity and location of the witnesses, the date and time of the event as these are crucial to determine the course of the investigation."[323] In **Canada**, investigators are expected to use "initiative, investigative experience and professional skills in a thorough methodological preparation of their work."[324] By enumerating the investigator competence criteria, an investigative body sets the foundation for efficient and thorough investigations.

Standards of competency for an investigative body can be actualized through appropriate recruitment, training, and professional development initiatives.

### *Recruitment*

To establish credibility of the investigative process, an investigative body's enacting legislation, as well as the rules and regulations that govern its operations, should define the technical and professional criteria for the recruitment of investigators. Appropriate recruitment criteria and processes reinforce the competence and professionalism of election investigators. However, the temporary nature of some election investigative bodies may preclude advance recruitment, making it more difficult to find competent and available staff for a limited election timeframe. Thus, criteria should reflect the structure of the institution—if an investigative body is temporary, it may be necessary to relax criteria (within reason) in order to rapidly recruit short-term staff. When

322 Orozco-Henríquez et al., *supra* note 101, at 97–99.

323 Bhutan Election Dispute Settlement Manual, *supra* note 27, ¶ 6.1.

324 Canadian Investigators' Manual Ch. 5, *supra* note 85, at 4.

the hiring of short-term staff is required, however, the need to invest in and implement highly effective training and oversight is of the utmost importance.

As the American Bar Association's *Standards for Prosecutorial Investigation* suggest, investigative bodies should appoint supervisors with appropriate experience; strong commitment to integrity, justice, and ethics; and capacity for managing a corps of investigators and support staff.[325] State legal frameworks often provide the criteria for election commissions as well as for adjudicative and investigative bodies. Elections **Canada** requires special investigator candidates: to have formal training in a police academy or equivalent; to have served in a Canadian police or security agency; to have a strong background in criminal investigation, evidence collection, and court procedures; to have extensive knowledge of applicable Canadian laws; to have investigative experience in other fields, depending on demonstrated experience and ability; and to have a reputation for professional and personal integrity.[326]

Within the guideline parameters for criminal prosecution, the United Nations urges that "selection criteria…embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status, except that it shall not be considered discriminatory to require a candidate for prosecutorial office to be a national of the state concerned."[327] This principle of non-discrimination should be extended to developing a professional investigative body in order to promote accessibility and integrity of institutional processes.

Equipped with necessary policies and procedures, investigative bodies should be fully functional well in advance of an electoral cycle. Otherwise, the body cannot respond to the demands of the electoral process and may be vulnerable to errors. During both the 2009 and 2010 election cycles in **Afghanistan**, for example, the ECC was unprepared for the sheer number of fraud cases and other irregularities under investigation. Established just 120 days prior to each election, the ECC struggled to devise new procedural frameworks as well as to hire and train a new corps of professional staff within the short

325 *See* Standards for Prosecutorial Investigations, *supra* note 82, § 2.15(c).

326 Canadian Investigators' Manual Ch. 2, *supra* note 322, at 2.

327 U.N. Guidelines on the Role of Prosecutors, *supra* note 320, § 2(a).

timeframe.[328] Hence, the ECC was unable to operationalize these core functions so close to the elections and struggled to inform the public, other election bodies, candidates, and party agents throughout the country of the policies and procedures in place for filing complaints, conducting investigations, and resolving claims.[329] With thousands of complaints filed, the system partially collapsed under pressure—the ECC was forced to deviate from approved procedures and excluded an unnecessarily large number of polling stations from the count.

Discretionary funding is necessary to ensure that an investigative body is sufficiently staffed with competent investigators. Such funding allows an investigative body to maintain autonomy and independence. During the 2011 **Nigerian** general elections, the under-funded Independent National Electoral Commission (INEC) struggled to organize the staffing necessary to investigate over 870,000 cases of detected multiple registrations. As a result, only 270 cases were investigated and subsequently prosecuted by INEC.[330]

### *Training and Professional Development*

To develop professional institutions and ensure that investigations are held to the highest standards of competence, the institution that has subject-matter jurisdiction for investigating electoral complaints and irregularities must plan and implement training programs for investigators, including both permanent and ad hoc staff. Training should focus on subject matters associated with electoral investigations, such as candidate registration, campaign finance, voter registration, polling and Election Day violations, and counting irregularities. As with other stakeholders involved in the dispute resolution process, training programs for investigators should introduce key international principles for election complaints adjudication and should seek to impute a comprehensive and up-to-date understanding of the electoral dispute resolution process and the current status of legislation and regulations.[331]

A robust and comprehensive training program for staff, tailored to their responsibilities, could help strengthen the competence of investigators as well as

328 IFES, Afghanistan Electoral Integrity Assessment Final Report 63 (May 2013) (unpublished report) (on file with IFES).

329 *Id.* at 66.

330 The INEC detected 870,000 multiple registrations out of 73.5 million voters registered for the 2011 elections. *See* Festus Okoye, Friedrich-Ebert-Stiftung (FES), The Prosecution of Electoral Offenders in Nigeria: Challenges and Possibilities 2 (2013), http://library.fes.de/pdf-files/bueros/nigeria/10405.pdf; *Nigeria: Pass Bill to Prosecute Electoral Offenses*, Human Rights Watch (Mar. 3, 2011), http://www.hrw.org/news/2011/03/13/nigeria-pass-bill-prosecute-electoral-abuses.

331 *See generally* GUARDE, *supra* note 1.

build public confidence and participation in the dispute resolution process.[332] Potential complainants are more likely to come forward with legitimate claims if they believe that investigators are capable of detecting violations, of gathering evidence against offenders, and of ultimately resolving the claim.

In the context of prosecutor guidelines, the United Nations urges states to provide "appropriate education and training," particularly of "the ideals and ethical duties of [the] office, of the constitutional and statutory protections for the rights of the suspect and the victim, and of human rights and fundamental freedoms recognized by national and international law."[333] Additionally, the American Bar Association's *Standards for Prosecutorial Investigation* urge state prosecutor offices to provide training on investigative techniques and associated ethical choices.[334] Extending these principles to the election context, investigative bodies can implement initial and in-service training by concentrating on:

- Technical knowledge and skills that relate to investigative techniques;
- Investigation processes and triage procedures;
- Uniform application of the applicable legal electoral framework;
- Investigation ethics and electoral integrity, including applicable codes of conduct;
- Domestic and international human rights protection for interested parties and witnesses;
- Democratic values and internationally recognized principles on the conduct of elections; and
- Consequences for misconduct and malpractice.[335]

Regardless of whether an investigative body is permanent or temporary, investigator training should begin well in advance of an election. Mexico's Electoral Judicial School (Escuela Judicial Electoral)—within the Electoral Tribunal of the Federal Judiciary—collaborates with the National Electoral Institute (INE) and the Special Prosecutor´s Office for Electoral Crimes (FEPADE) in

332 *See, e.g.*, U.N. Office of Drugs & Crime, Anti-Corruption Toolkit: Chapter 5 (Enforcement) (2002), http://www.unodc.org/pdf/crime/toolkit/f5.pdf.

333 U.N. Guidelines on the Role of Prosecutors, *supra* note 320, § 2 .

334 ABA Standards for Prosecutorial Investigations, *supra* note 82, § 2.15(c).

335 *See* IFES, Afghanistan Electoral Integrity Assessment Final Report 72–73 (May 2013) (unpublished report) (on file with IFES); Org. for Sec. & Co-operation in Europe (OSCE), Guidebook for Democratic Policing ¶¶ 147, 149 (2d ed. 2008), http://www.osce.org/spmu/23804 [hereinafter OSCE Guidebook for Democratic Policing].

order to train staff from these agencies on the electoral laws and regulations, the Electoral Tribunal's procedures and electoral policies, as well as specific topics, such as independent candidacies, proportional representation, and political communication, among others. Mexico is a rare example of a state in which in-depth training is provided, however. Investigators often do not receive sufficient training to perform their tasks because such instruction is lacking at key points in the electoral process. Investigative bodies should provide ongoing training to enable investigators to understand the complexities of the legal and regulatory system that governs elections and to respond to the political contexts in which elections take place.

## Professionalism

While competence in an election investigation context is a prerequisite for professionalism—requiring the formation of a corps of fully-trained electoral officials, investigators, and support staff[336]—it also envisages accountability measures and the development and implementation of standard operating procedures for investigations.

To develop a professional investigative body, the state should separate the government's role of setting policies, overseeing, and reviewing an investigative body from that body's exercise of internal policy-making and operational management.[337] The American Bar Association's *Standards for Prosecutorial Investigation* emphasize sound but flexible internal policies within the investigative body that "reinforce standards of excellence, professionalism, and ethics."[338]

Investigative bodies must ensure the effective management of the investigatory process by providing a clear chain of command and delineating roles and responsibilities. Election officials and supervisors should have the authority to make autonomous decisions, subject to review by legislative, executive, and judicial authorities.[339] Elections **Canada**, for instance, provides a clear hierarchy for the control of investigations: "[T]he Chief Investigator is responsible for the planning, organization, execution, coordination, and

336 Orozco-Henríquez et al., *supra* note 101, at 27.

337 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 113.

338 ABA Standards for Prosecutorial Investigations, *supra* note 82, § 2.15(c)(iv).

339 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 114.

monitoring of investigative processes" under the supervision of the Counsel to the Elections Commissioner.[340] As they are role models for investigators and support staff, senior officials and supervisors should demonstrate compliance with applicable electoral laws and regulations, internal policies, codes of conduct, and standards for investigation.[341]

### *Accountability*

Accountability mechanisms that include internal and external checks on the investigative process should be developed to help ensure that the investigative body and its individual investigators carry out their duties appropriately, free from conflicts of interest, in line with ethical and professional standards, and that they are held responsible for failing to fulfill their mandates.

In support of this objective, states should establish and implement normative and procedural safeguards to promote accountability in the investigation process, with the twin goals of preventing investigators from misusing their powers and addressing such conduct when necessary.[342] All activities should be open to review by internal mechanisms and to monitoring by a variety of external oversight institutions.[343] Because investigators act on the basis of directives and guidelines, accountability includes responsibility for the direction and control exercised before and during operations.[344] As such, extending the principles set out in the United Nations' *Handbook on Police Accountability*, effective accountability for electoral investigations could involve:

- **Direction Setting:** Prior to operations, an investigative body and other relevant agencies set priorities and policies that accurately reflect electoral laws and regulations, providing practical guidance for investigators on how to properly carry out investigations while remaining responsive to the concerns of citizens, political parties, and other interested stakeholders. Direction setting also involves establishing effective complaints procedures for misconduct or malpractice.

340 Canadian Investigators' Manual Ch. 5, *supra* note 85, at 2.

341 *See* OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 118.

342 *See generally, e.g.*, U.N. Office of Drugs & Crime, Handbook on Police Accountability, Oversight, and Integrity (2011), http://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/PoliceAccountability_Oversight_and_Integrity_10-57991_Ebook.pdf [hereinafter U.N. Handbook on Police Accountability, Oversight, and Integrity].

343 *Cf.* OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 83.

344 U.N. Handbook on Police Accountability, Oversight, and Integrity, supra note 343, at 10–11.

- **Supervision:** During investigation, an investigative body supervises the daily operations of investigators. External institutions monitor the investigative process—for example, ombudsmen or inspectors general.
- **Evaluation:** After the conclusion of operations, internal units and external institutions review an investigative body's investigation, management, and administration to provide feedback and reflect on lessons learned. Review ensures a mechanism for remedying and punishing misconduct or malpractice.[345]

The following sections discuss both internal and external accountability mechanisms in more detail.

### a. Internal Mechanisms for Accountability

Investigative bodies are in the best position to assess allegations of misconduct and to develop rules that are appropriate to their context.[346] Because accountability connotes the responsibility for giving directions and preparing investigators for their operations, it applies to the actions of individual staff, supervisors, and the investigative body as a whole.[347] Therefore, investigative bodies should develop clear systems of internal review and evaluation, together with procedures for addressing misconduct that are appropriate to the institutional structure and culture. To enable external review, investigative bodies should publicly disseminate the relevant rules that regulate the institution's scope of work and investigator conduct.[348] For example, codes of conduct should be made accessible to citizens, political parties, and other interested stakeholders.

Internal accountability mechanisms require an effective chain of command within an investigative body and could include reporting systems and internal disciplinary measures.[349] Whatever mechanism is employed, the United Nations emphasizes that the chain of referral "should be clear, with time limits and explicit standards governing the categories of allegation that must be referred

345 *Cf. id.*

346 *See* U.N. Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, *supra* note 80, at 41.

347 *Cf.* U.N. Handbook on Police Accountability, Oversight, and Integrity, *supra* note 343, at 11.

348 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 11.

349 U.N. Handbook on Police Accountability, Oversight, and Integrity, *supra* note 343, at 11.

for review."[350] It is important to establish the obligations of managers and supervisors in order to mitigate the occurrence of malpractice by employees. The American Bar Association, for instance, states that managers and supervisors must make "reasonable efforts" to ensure that employees comply with the rules of professional conduct and that they can be sanctioned for an employee's malpractice.[351] In reviewing complaints about investigators, investigative bodies must also balance the rights of citizen to complain with the rights of investigators.[352]

Some bodies, particularly those that are permanent, institute complaint systems for issues relating to staff performance and misconduct. Although most allegations usually go through a supervisor, the investigative body could also designate a different point of contact, particularly for claims involving supervisors or senior officials.[353] Mechanisms for internal review of more serious offenses, particularly those involving the conduct of senior-level staff members and officials, include internal investigation units or ad hoc disciplinary committees composed of senior officials. While minor offenses can be addressed internally, it may be necessary to examine more serious offenses outside the immediate chain of command.[354]

The following subsections discusses the evaluation of investigator performance, codes of conduct, and disciplinary measures.

### *Evaluation of Investigator Performance*

Early and accurate reporting of investigator performance helps establish and maintain an investigative body's credibility.[355] In addition to addressing misconduct, inspection and monitoring measures are essential for evaluating the general quality of investigative operations, for ensuring that the investigative body's priorities are being met, and for ensuring proper management and control of investigations.[356]

Hence, investigative bodies should consider incorporating a mechanism for

350 U.N. Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, *supra* note 80, at 41.

351 ABA Comm. On Ethics & Prof' Responsibility, Formal Op. 467, 3, 12 (2014).

352 *Cf.* OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 87.

353 *Cf.* U.N. Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, *supra* note 80, at 41.

354 *Id.*

355 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 123.

356 *Id.* ¶ 92.

assessing the performance of investigators both during and after operations into their supervision structure.[357] In this manner, supervisors can check compliance with rules and regulations, codes of conduct, internal policies, and investigation standards through regular inspection and reporting.[358] Such a supervisory reporting system can provide timely information for the investigative body to addresses issues of concern and to identify trends in complaints and gaps in resources. Furthermore, investigative bodies can conduct a review of the entire investigation process following the resolution of the electoral process. Using the standard encompassed in the American Bar Association's *Standards for Prosecutorial Investigation*, an investigative body could, to the extent to which this is possible, "analyze investigations retrospectively" and "evaluate techniques and steps that worked well or that proved to be deficient."[359]

### *Codes of Conduct*

Many countries employ codes of conduct to stipulate how election officials should carry out their duties. Election experts have recognized that electoral codes of conduct "can contribute to fairness and to the appearance of fairness in the administration of an election."[360] By reinforcing the legal framework and promoting the rule of law, they can heighten the credibility, transparency, and accountability of the electoral process and facilitate the emergence of a democratic political culture.[361]

Codes of conduct should address several basic issues, including the avoidance of conflicts of interest, the commitment to maintaining the integrity of the electoral process, the support for the principle of political non-partisanship, the provision of quality service, and the adherence to regulations and managerial directions.[362] Impartiality and objectivity are also common principle-based standards for codes of conduct for public servants.[363] In **Pakistan,** the Election Commission instructs election investigators to abide by the principles of

357 *Id.* ¶ 120.

358 *Id.* ¶ 121.

359 ABA Standards for Prosecutorial Investigations, *supra* note 82, § 2.14(d).

360 Guy S. Goodwin-Gill, Inter-Parliamentary Union (IPU), Codes of Conduct for Elections: A Study Prepared for the Inter-Parliamentary Union 3 (1998), http://www.ipu.org/PDF/publications/CODES_E.pdf.

361 *Id.*; *see also* Orozco-Henríquez et al., *supra* note 101, at 12.

362 *See* Orozco-Henríquez et al., *supra* note 101, at 12.

363 Stuart C. Gilman, Ethics Codes and Codes of Conduct as Tools for Promoting an Ethical and Professional Public Service: Comparative Successes and Lessons 13 (2005), http://www.oecd.org/mena/governance/35521418.pdf.

integrity, objectivity, impartiality, competence, fairness, accountability, and transparency.[364] Regardless of where the code originates, relevant authorities should ensure that the code of conduct is consistent with and complementary to any behavioral requirements in the constitution or other applicable laws.[365]

It is considered good practice to require the staff of electoral management bodies to sign a document indicating their acceptance of the code of conduct as a condition of their employment.[366] The same standard should extend to investigators as well. In **Afghanistan**, for example, ECC commissioners and staff members were required to sign a code of conduct that was developed and adopted pursuant to Article 2 of the Electoral Complaints Commission's Rules of Procedure.[367] By affirming their commitment to high professional standards, investigators send a strong signal that they "will perform well, be open and approachable, and not tolerate the abuse of power, corruption, neglect of duty… or any misconduct" and that they will not cover any acts of wrongdoing.[368]

In the event that wrongdoing does occur, the breach of the code of conduct should constitute a punishable offense, pursuant to the country's laws.[369] In **Australia**, public employees who violate the code of conduct may face an official reprimand, a reduction in salary, a re-assignment of duties, or a termination of employment.[370] By backing up a code of conduct with an enforcement mechanism, states can strengthen the role that the code plays in promoting accountability among investigators.

### *Disciplinary Measures*

States should institute systems for disciplinary actions in cases of investigator misconduct and malpractice, which serve to both uphold the institutional credibility of investigative bodies and to protect the rights of investigators under review. The liability framework should include mechanisms to address misconduct and protections to guarantee action only for violations established in elec-

364 Handbook on the ECP Election Complaints Process, *supra* note 22, at 11.

365 Alan Wall et al., Int'l Inst. for Democracy & Electoral Assistance, Electoral Management Design: The International IDEA Handbook 73 (2006).

366 Orozco-Henríquez et al., *supra* note 101, at 12.

367 GUARDE, *supra* note 1, at 49.

368 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 159.

369 Orozco-Henríquez et al., *supra* note 101, at 32.

370 *Public Service Act 1999* (Cth) § 15, ¶ 1 (Austl.).

toral laws, regulations, and codes of conduct. A liability framework for electoral investigations would guarantee: (a) the implementation of mechanisms that impose disciplinary measures for improper, wrongful, or negligent conduct by election officials, investigators, and support staff; and (b) that such measures are used only for established violations.[371] This framework serves to reinforce electoral laws and regulations, codes of conduct, and investigation standards.

In developing such a framework, a state would need to consider what actors and institutions should have the authority to decide on misconduct cases and appeals, on procedural safeguards for protecting the rights of investigators, on grounds for disciplinary action, and on appropriate sanctions. These questions should be answered through clear electoral rules and regulations, promulgated well in advance of an election.

### Elements of a Liability Framework for Electoral Investigations

- Definition of authority for deciding on misconduct cases and appeals
- Procedural safeguards for protecting the rights of investigators
- Established grounds for disciplinary action
- System for enforcing appropriate sanctions

As with all disciplinary and criminal proceedings, procedural safeguards must be in place to protect the rights of investigators. The European Court of Human Rights[372] and the Inter-American Court of Human Rights have found that due process rights can apply not only to judicial but also to administrative proceedings, including those related to the rights of civil servants. The Human Rights Committee, in

371 Orozco-Henríquez et al., *supra* note 101, at 111.

372 *See*, *e.g.*, Vilho Eskelinen v. Finland, App. No. 63235/00 Eur. Ct. H.R. 57, 62 (2007). The Court finds that access to court review is often accorded to civil servants, enabling claims for salary, allowances, dismissal, and recruitment on a similar basis to employees in the private sector. In these circumstances, there is no conflict between the interests of the State and the right of an individual to protection under domestic law. The Court provides a two-stage test for a respondent state to rely on an applicant's status as civil servant in order to exclude application of fair trial guarantees:
Firstly, the State in its national law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on objective grounds in the State's interest . . . Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of *ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements*, on the basis of the special nature of relationship between the particular civil servant and the State in question. There will, in effect, be a presumption that Article 6 applies. It will be for the respondent Government to demonstrate, firstly, that a civil-servant applicant does not have a right of access to a court under national law and, secondly, that the exclusion of the rights under Article 6 for the civil servant is justified. ***(Emphasis added)***.

General Comment No. 32, clarified that the right to a fair trial applies to certain administrative proceedings that affect the rights of individuals under law.[373] In other words, where an individual's right under the law is at stake—such as in disciplinary actions that involve penal sanctions—the state must ensure that the dispute is resolved through a fair process.

While there are no guidelines specific to election investigators, it is possible to extend international due process principles for assessing the conduct of judges, prosecutors, and lawyers to this investigatory context.[374] Specifically, the United Nations' *Basic Principles on the Independence of the Judiciary*, *Guidelines on the Role of Prosecutors*, and *Basic Principles on the Role of Lawyers* provide guidance for developing a state's liability framework for election investigator misconduct. For example, fair notice requires that rules be determined in accordance with a state's legal framework, including laws and regulations, applicable codes of professional conduct, and established standards and ethics.[375] This ensures that all persons have knowledge of what is and is not punishable, thus preventing arbitrary enforcement of laws and regulations.

As an investigation of electoral fraud or other claims would be highly politicized, states must provide for appropriate procedures to ensure that investigators are given due process, as outlined in domestic and international human rights law.[376] States should process charges or complaints against investigators within a reasonable timeframe according to procedures established in the law.[377]

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373 H.R.C. General Comment No. 32, ¶ 16, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) [hereinafter General Comment No. 32].

374 *See generally* Office of the High Comm'r for Human Rights, *Independence and Impartiality of Judges, Prosecutors and Lawyers*, in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers 113–154 (2003) [hereinafter OHCHR Manual].

375 *See* Basic Principles on the Independence of the Judiciary, *supra* note 112 ("all disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct"); U.N. Guidelines on the Role of Prosecutors, *supra* note 320, § 21 ("disciplinary offenses of prosecutors shall be based on law or lawful regulations"); Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Basic Principles on the Role of Lawyers ¶ 29, U.N. Doc. A/CONF.144/28/Rev.1, at 119 (1990) [hereinafter Basic Principles on the Role of Lawyers] (all disciplinary proceedings "shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles").

376 *See* Eur. Consult. Ass., Rec. No. R(94) 12 of the Comm. of Ministers to Member States on the Independence, Efficiency, and Role of Judges, Principle (VI.3), 518th Sess. (Oct. 13, 1994).

377 Basic Principles on the Independence of the Judiciary, *supra* note 112 ("[A] charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The Judge shall have the right to a fair hearing."); U.N. Guidelines on the Role of Prosecutors, *supra* note 320, § 21 (complaints against prosecutors which allege that they "acted in a manner clearly out of the range of professional standards shall be processed expeditiously and fairly under appropriate procedures"); Basic Principles on the Role of Lawyers, *supra* note 376, ¶ 27 ("Charges or complaints made against lawyers in their professional capacity shall be processed expeditiously and fairly under appropriate procedures.") .

## International Human Rights Guarantees to Fair Trial in Civil, Criminal, and Administrative Proceedings

***International Covenant on Civil and Political Rights, Article 14.1***

"All persons shall be equal before the courts and tribunals. In the determination of a criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

***European Convention on Human Rights, Article 6(1)***

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

***American Convention on Human Rights, Article 8***

"Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature."

***African Charter on Human and Peoples' Rights, Article 7(1)***

"Every individual shall have the right to have his cause heard. This comprises:

The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force;

The right to be presumed innocent until proved guilty by a competent court or tribunal;

The right to defence, including the right to be defended by counsel of his choice; [and]

The right to be tried within a reasonable time by an impartial court or tribunal."

As outlined in the United Nations' *Basic Principles on the Role of Lawyers*, a fair hearing in the context of disciplinary action includes the right to legal counsel.[378]

378 Basic Principles on the Role of Lawyers, *supra* note 376, ¶ 27 ("Lawyers shall have the right to a fair hearing, including the right to be assisted by a lawyer of their choice."). This text is noticeably absent from the Basic Principles on the Independence of the Judiciary and the U.N. Guidelines on the Role of Prosecutors.

A disciplinary unit or body should provide legal reasoning to justify its decision. States should provide for disciplinary proceedings to be kept confidential unless the investigator him or herself requests a public hearing.[379]

A part of ensuring that a hearing is fair relates to ensuring that the disciplinary proceedings involving investigators are conducted by an independent unit of the investigative body or an independent institution in order to prevent undue interference in the review of misconduct.[380] In addition, disciplinary proceedings should be subject to independent review—such a review serves to prevent interference and to strengthen professional autonomy of investigators.[381]

Another important element of establishing a liability framework is to determine the grounds for discipline. International guidelines on assessing the conduct of judges provide guidance on determining what investigator actions or inaction should be subject to discipline. In this context, disciplinary action should focus on conduct or behavior that suggests investigators are "unfit to discharge their duties."[382] Grounds for disciplinary action must be authorized in law prior to any such action taking place. Crucially, states should not subject investigators to disciplinary action as a result of legitimate determinations about whether to proceed with investigations, findings on the merits of complaints, or investigation findings.[383] As asserted by the UNDP OAI, actions that produce an "undue interference with [an] investigation" may require disciplinary action.[384]

While grounds for disciplinary action and disqualification may differ depending on a state's administrative and electoral laws, they can include issues such as bias, conflict of interest, and corruption.[385] Depending on the gravity

379 Basic Principles on the Independence of the Judiciary, *supra* note 112 ("[The] examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.").

380 *Id.*; U.N. Guidelines on the Role of Prosecutors, *supra* note 320, § 21; Basic Principles on the Role of Lawyers, *supra* note 376, ¶ 20.

381 Basic Principles on the Independence of the Judiciary, *supra* note 112 ("Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to decisions of the highest court and those of the legislature in impeachment or similar proceedings.").

382 Basic Principles on the Independence of the Judiciary, *supra* note 112 (judges "shall be subject to suspension or removal only for reasons of incapacity or behavior that renders them unfit to discharge their duties").

383 *Cf.* OHCHR Manual, *supra* note 375, at 129.

384 UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 7.

385 *See* Orozco-Henríquez et al., *supra* note 101, at 109.

of the offense, penalties for improper, wrongful, or negligent conduct may include transfer, suspension, termination, fine, and prosecution.[386]

The **Philippines** provides a good example of a comprehensive procedure for disciplinary action and associated penalties. According to the election law, if an election officer is found guilty of misconduct following a procedure that protects the officer's due process rights, the authority with jurisdiction over the matter can order suspension, removal from office, and fines.[387] The Anti-Graft and Corrupt Practices Act provides for further penalties, including imprisonment, fines, removal or dismissal from public office, permanent disqualification from public office, and confiscation or forfeiture of assets.[388] In addition, the Congress is empowered to impeach members of the Election Commission for a culpable violation of the Constitution, such as treason or corruption.[389]

386 *See, e.g.*, Kingdom of Bhutan, Election Act of the Kingdom of Bhutan § 324 (2008); Republic of Georgia, Law of Georgia on Public Service No. 45, arts. 78, 79 (1997).

387 Omnibus Election Code, B.P.Blg. 881, art. VII, sec. 52 (Phil.) ("[A]s any public official or employee, regardless of whether or not he holds office or employment in a casual, temporary, holdover, permanent or regular capacity, committing any violation of this Act shall be punished with a fine not exceeding the equivalent of six (6) months' salary or suspension not exceeding one (1) year, or removal depending on the gravity of the offense after due notice and hearing by the appropriate body or agency. If the violation is punishable by a heavier penalty under another law, he shall be prosecuted under the latter statute. Violations of Sections 7, 8 or 9 of this Act shall be punishable with imprisonment not exceeding five (5) years, or a fine not exceeding five thousand pesos (P5,000), or both, and, in the discretion of the court of competent jurisdiction, disqualification to hold public office.")

388 Anti-Graft and Corrupt Practices Act, Rep. Act No. 3019, § 9 (1960) (Phil.).

389 Const. (1987), art. XI, sec. 2 (Phil.) ("The President, the Vice-President, the Members of the Supreme Court, the Members of the Constitutional Commissions, and the Ombudsman may be removed from office on impeachment for, and conviction of, culpable violation of the Constitution, treason, bribery, graft and corruption, other high crimes, or betrayal of public trust. All other public officers and employees may be removed from office as provided by law, but not by impeachment.").

### b. External Mechanisms for Accountability

Effective accountability "involves many different actors representing the different layers of modern-day democracies."[390] Specifically, institutions that oversee the work of investigative bodies may include the legislature, through initiatives of its members or specific commissions for inquiry; the judiciary, through criminal or civil review of specific cases; "as well as human rights commissions, civilian complaint review boards or independent ombudspersons."[391] Another source of external oversight may be a professional organization that oversees the behavior of its members and issues sanctions for malpractice. In the **United States**, for example, the American Bar Association establishes the standards for the professional conduct of attorneys. Oversight from these institutions can help ensure impartial and effective investigation in the electoral context.[392]

There are several practical reasons to encourage external oversight of investigative bodies. External oversight can foster an impartial and independent review of serious allegations against investigators, officials, or staff, and identify and address conflicts of interest. Furthermore, the appearance of impartiality inspires confidence in these oversight institutions, thereby encouraging the public's use of complaints mechanisms. External oversight may encourage investigators and staff to report the misconduct or malpractice of others within the investigative body, particularly supervisors or overall mismanagement.[393]

The degree to which oversight institutions are involved in reviewing an investigative body's operations or investigator conduct varies considerably across country contexts. As the OSCE notes: "While some oversight organizations take responsibility for receiving and investigating complaints – sometimes only in cases of serious misconduct or if internal investigations appear faulty – others are limited to overseeing and reviewing investigations carried out by the…agencies themselves."[394]

Legislatures often institute anti-corruption measures for making public agencies—including adjudicative and investigative bodies—more directly

390 U.N. Handbook on Police Accountability, Oversight, and Integrity, *supra* note 343, at iv.

391 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 84.

392 Merloe, *supra* note 92, at 33.

393 *Cf.* OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 86.

394 *Id.* ¶ 85.

accessible and accountable to citizens. The **Philippines** Anti-Red Tape Act, for instance, requires all public agencies to set up service standards, known as Citizen's Charters. These Charters are made accessible to the public; they are posted at a conspicuous place within a relevant office and disseminated in published materials that detail the agency's mandate, services available, and procedures for filing complaints.[395] The Act also provides for a Report Card Survey, through which the public offices and agencies that provide direct services are subjected to a Civil Service Commission review. This Report Card is used to obtain feedback on how provisions in Citizen's Charters are being followed and how agencies are performing.[396]In the electoral context, providing clear disclosure and feedback mechanisms can help inform domestic observation missions and become a part of a broader effort to build trust in the electoral process.

Independent oversight bodies, such as ombudsmen offices, provide a public check on investigators and the investigation body. In the **Philippines**, the Office of the Ombudsman has the power to:

- Investigate any act or omission of any public official, employee, office or agency, including the Commission on Elections;
- Direct any public official employee or agency to perform an act or duty required by law, or to stop, prevent, and correct any violation or irregularity;
- Direct the body concerned to take appropriate action against a public official or employee at fault, recommending removal, suspension, demotion, censure, or prosecution;
- Determine the causes of mismanagement, fraud, and corruption; and
- Make recommendations for addressing these issues.[397]

### *Standard Operating Procedures*

Investigative bodies must establish clear, written Standard Operating Procedures (SOPs) to guide "the submission, receipt, handling, transfer, and disposition of evidence" in electoral disputes.[398] SOPs must clearly define the duties

395 Anti-Red Tape Act, Rep. Act No. 9485, § 6 (2007) (Phil).

396 *Id.*

397 Const. (1987), art. XI(13) (Phil.).

398 Joseph T. Latta & Robert E. Giles, *Professional Standards*, 2012 Int'l Ass'n for Prop. & Evidence 13, http://www.iape.org/standards/IAPE_Standards_2.4.pdf (SOPs refer to instructions which cover operations that can be standardized or regulated without "loss of effectiveness").

and responsibilities of investigators and investigative body staff and should be disseminated so as to provide instruction and notice to those involved in the investigative process.[399] To ensure that investigators are thoroughly familiar with SOPs, investigative bodies should provide ongoing training on the procedures for evidence control.[400] Investigators themselves should ensure that they are familiar with the policies and procedures for evidence control.[401]

### Sample Standard Operating Procedures (SOPs) for Proper Chain of Custody in Investigations

The International Association for Property and Evidence and the United Nations Office on Drugs and Crime's considerations for SOPs in criminal investigations can be extended to the electoral context and may include:

Requirement that all evidence be logged into the investigative body's records at the time of collection. The log or database should detail the items retrieved, how the investigative body retrieved the evidence, the location of collection, and the date of collection;

- Requirement that all evidence be kept in a designated control area;[402]
- Requirement that the investigative body notifies the finders or owners of property taken into custody as evidence and issues a written receipt;
- Procedures for the temporary release of evidence from the designated control area for purpose of investigation or adjudication;
- Requirements for packaging, movement, and disposition of evidence.[403]

399 *Id.*

400 *Cf.* Comm'r of Canada Elections, *Ch. 9 Collection, Use, and Preservation of Evidence*, in Investigators' Manual 1 (2004) [hereinafter Canadian Investigators' Manual Ch. 9] (noting that investigators "must be thoroughly familiar with the . . . procedures for the control of evidence").

401 *Id.*

402 A designated control area refers to a secured space, with regulated access, where evidence is preserved during the course of investigation.

403 Latta & Giles, *supra* note 399, at 13–14; U.N. Office on Drugs & Crime, Crime Scene and Physical Awareness for Non-Forensic Personnel 15 (2009).

In addition, investigative bodies should develop user-friendly forms that capture SOPs so that investigators can properly track the internal and external movement of evidence, submit the evidence to adjudicating bodies, document an individual's handling of evidence and access to the designated control room, and document the property release and disposition.[404] Election investigators must take care to closely adhere to the SOPs that pertain to the maintenance of a proper chain of evidence during the investigative process. A failure to do so could undermine the integrity of the evidence collected and, ultimately, the quality of the investigation itself.

Some policies that are especially important in the context of election dispute investigation include maintaining a proper chain of evidence, continuity of possession, security, and inspection. They are discussed in more detail in the following subsections.

### Maintaining a Proper Chain of Evidence

Investigative bodies should institute policies and procedures to maintain a proper chain of custody in handling the evidence that is related to electoral disputes. Evidence management pertains to the handling of evidence—such as personal information, candidate registration documentation, voter registration rolls, balloting and count materials, campaign finance records, or other relevant documentary evidence—in a manner that ensures a proper chain of custody is followed throughout the investigative process.[405] In the election context, "chain of custody" refers to the "chronological and careful documentation of evidence to establish its connection" to election disputes

404 *Cf.* Latta & Giles, *supra* note 399, at 19–22.

405 The Elections Canada Special Investigators Manual defines "personal information" as recorded information about an identifiable individual, as defined in the Canadian Privacy Act. *See* Canadian Investigators' Manual Ch. 8, *supra* note 146, at 1–11. Candidate registration documentation refers to any documentary evidence relating to an individual's application for candidacy and the election management body's or other relevant agency's determination of that individual's eligibility. Voter registration rolls refer to documentary evidence associated with an individual's application to register to vote, official information on an individual's registration, and lists or databases of registered voters. Balloting and count materials include any documentary evidence associated with polling—whether through the early vote, absentee vote, or Election Day vote counts—and official counting procedures and practices. Such evidence may include ballots, ballot boxes, and election technology; official checklists or procedural records; witness statements; photographs; reports by candidate or party agents and observation groups. Campaign finance records and information refer to any documentary evidence relating to candidate or party campaign finance measures, including: candidate declarations; deposit slips or cancelled checks; campaign bank statements; bills and vouchers related to the payment of campaign expenses; lists or databases capturing contributions of goods and services; witness statements; documentation indicating a candidate's personal expenses; records of contributions and official income tax receipts; and auditor's reports. Other relevant documentary evidence may refer to witness statements and records relating to an election campaign, voter registration, election administration, election violence, or voting and counting.

and alleged violations,[406] with the aim of preserving the integrity of evidence and mitigating security risks in keeping such information.[407] Ultimately, "the goal is to establish a clear and unbroken chain of records that allows the court [or other adjudicative body] to reconstruct who has had control of what information at every point in time."[408]

Proper chain of custody is a crucial component of investigation and dispute resolution, more generally, as adjudication decisions may be affected by the quality of the physical evidence supporting a complaint. Investigative bodies have the burden of proving that the collection, use, and preservation of evidence comports with international and national best practices for investigation. Thus, investigative bodies must ensure that evidence meets internal standards and conforms to admissibility requirements.[409]

### Continuity of Possession

In addition to regularly cross-checking each item of evidence against the corresponding records, an investigative body must also maintain a thorough inventory of physical evidence to ensure that all items are properly secured and preserved for subsequent adjudication.[410] The inventory process begins with logging evidence as it enters the investigative body and ends when the complaint is resolved with a record of the disposition. Inventory lists should indicate an evidence item's specific location within a designated control area. To protect information during the inventory process, investigators should maintain duplicates of documents, seal boxes holding original documents, and limit access to inventory logs and evidence.[411]

When moving evidence from the property room to any external location, investigators must monitor the transfer and treatment of the evidence to ensure that it is returned in a timely manner.[412] If possible, the investigative body should require the individual who is authorized to transfer evidence,

406 U.N. Office on Drugs & Crime, Crime Scene and Physical Awareness for Non-Forensic Personnel 4 (2009).

407 Christian A. Nielsen & Jann K. Kleffner, A Handbook on Assisting International Criminal Investigations 56 (Maria Nystedt ed., 2013).

408 *Id.*

409 *Cf.* Canadian Investigators' Manual Ch. 9, *supra* note 401, at 1–8; *see also* Evidence Act, R.S.C. 1985, c. C-5, §§ 24–31 (*as amended* 2013) (Can.) (information on admissibility of various documents for evidentiary purposes).

410 *Cf.* Latta & Giles, *supra* note 399, at 74.

411 Canadian Investigators' Manual Ch. 9 , *supra* note 401, at 3.

412 Latta & Giles, *supra* note 399, at 21; Canadian Investigators' Manual Ch. 9, *supra* note 401, at 5.

as well as the representative from the receiving institution, to review and sign an itemized evidence list.[413] SOPs should provide instructions for signing out evidence, monitoring the appropriate length of time for its removal, and securing it while at an external location to protect its integrity.[414]

Extending the standards outlined by the American Bar Association to this context, investigative bodies should ensure that evidence is returned to individual owners or official archives upon the completion of investigation and adjudication processes, unless a competent authority provides that evidence remains in custody.[415] In such circumstances, investigative bodies should return items in the condition in which they were obtained, to the greatest extent possible, and procure a signed receipt indicating disposition.[416]

### Security

To prevent unauthorized persons from interfering with the chain of custody, investigative bodies should incorporate specifications for limited access to the designated evidence control area into their SOPs. Specific security measures help preserve admissibility by ensuring that the evidence has not been compromised or physically altered.[417] As a general rule, "access restriction protects the proper chain of custody."[418] SOPs should, therefore, limit access to the designated control area to authorized personnel only.[419] Furthermore, "policy should define who has access to keys, access control, key duplication, changing of locks or access code with changes of personnel, access logs, after-hours procedures, and alarm testing."[420] Through use of an access log, investigative bodies must carefully monitor entry into restricted storage areas in order to guard against the possibility of alteration, unauthorized

413 *Cf.* Christian A. Nielsen & Jann K. Kleffner, *supra* note 408, at 56.

414 Latta & Giles, *supra* note 399, at 21.

415 American Bar Association Standards for Prosecutorial Investigations, *supra* note 82, § 2.14(h) ] ("Upon termination of the investigation and related proceedings, physical evidence other than contraband should be returned promptly to the person from whom it was obtained, absent an agreement, court order or requirement of law to the contrary.").

416 *Cf.* Canadian Investigators' Manual Ch. 9, *supra* note 401, at 5.

417 Handbook on the ECP Election Complaints Process, *supra* note 22, at 12.

418 Latta & Giles, *supra* note 399, at 35.

419 *Id.*

420 *Id.*

**Elections Canada requires its Special Investigators to identify all documentary evidence in the following manner:**

(Excerpt from Commissioner of Canada Elections, Investigators' Manual 2 (2004), *Ch. 9 Collection, Use, and Preservation of Evidence).*

*For evidence contained in envelopes, boxes, and electronic devices:*

- "Record the file number of the investigation on the document and/or container;
- state in the investigation report the exact location, the…data base descriptions, and specific address where each document was seized or obtained, and from whom;
- describe each document and reference number;
- identify the Investigator taking possession of the documents;
- record the date and time of the receipt or seizure of documents; [and]
- prepare an exhibit report…."

*Additionally, for evidence and other information in electronic records, investigators should:*

- "[P]rovide the identity and address of all persons who…retrieved the information from the computer or database;
- identify the person who made entries in the record…;
- determine who has knowledge of [the evidence] and could therefore be a competent witness in any further investigation or court proceedings; [and]
- advise the providers that the documents will be returned once the matter has been resolved…."

removal or theft, or manipulation of evidence.[421]

Through controlled entry and exit, as well as restricted access, the location and premises of an investigation body should enable secure evidence storage.[422] Investigative bodies should store evidence in a secure location, where it would be protected not only from unauthorized access, but also from the

421 *See id.* at 35–36. (The International Association for Property and Evidence defines an access log as "a document that records the entry of non-assigned personnel into the property room, and why the entry was necessary. The log should record name, ID number, reason for the entry and which employee assigned to the property unit escorted the person.").

422 U.N. Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, *supra* note 80, at 42.

elements, like fire, water, and humidity.[423] For example, Elections Canada uses locked fireproof rooms as designated evidence control areas.[424] Finally, SOPs should clearly state accountability policies for persons with access to designated control areas and provide disciplinary actions for misconduct, malpractice, or negligence with respect to evidence.[425]

### Inspection

To monitor inventory and security measures, investigation supervisors should periodically inspect the designated evidence control area.[426] Inspections serve as an "important internal control" that allows for the early identification of problems or deficiencies in the evidence management system.[427] Inspections should cover key issues, such as "security, access control, [and] missing evidence," "general cleanliness and housekeeping of the area," and "inventory levels, safety practices, and training of [staff]."[428] To promote institutional learning, supervisors should record inspection results in writing.[429] As an accountability mechanism, external institutions should be empowered to conduct periodic audits of evidence management. Audits promote institutional integrity, compliance with legal requirements, and adherence to SOPs and policies.[430] To prevent arbitrary auditing and undue interference with an investigative body's operations, state policies should set the schedule and scope of audits in advance.

423 Nielsen & Kleffner, *supra* note 408, at 55.

424 Canadian Investigators' Manual Ch. 9, *supra* note 401, at 4.

425 *Cf.* Latta & Giles, *supra* note 399, at 35–36.

426 *Id.* at 76.

427 *Id.* at 76–77.

428 *Id.* at 76.

429 *Id.*

430 *Id.* at 77.

# PRINCIPLE 4: INDEPENDENT AND IMPARTIAL INVESTIGATORS

**Principle:** The principle of investigations being undertaken by independent and impartial bodies is fundamental to the credibility and legitimacy of the investigation process and outcome.

**Practice:** Independence and impartiality require that investigators and the investigation process:

- ✓ Be fair and objective;
- ✓ Avoid conflicts of interest; and
- ✓ Operate with integrity and incorruptibility.

**Chapter topics:** This chapter covers the following topics:

- ✓ Fairness;
- ✓ Objectivity;
- ✓ Conflicts of interest;
- ✓ Integrity and incorruptibility; and
- ✓ Functional and non-retaliatory immunity.

**INTERNATIONAL HUMAN RIGHTS-BASED** standards for the resolution of election disputes have recognized the universal importance of independent and impartial institutions in the electoral complaint resolution process.[431] In General Comment No. 32 to the ICCPR, the United Nations Human Rights Committee emphasized that the right to an independent and impartial tribunal is "an absolute right that may suffer no exception."[432] In other words, it is a right applicable in all circumstances.[433]

**Key Characteristics of Independent and Impartial Bodies:**

- Fairness
- Objectivity
- Conflict of interest disclosure
- Integrity and incorruptibility
- Functional and non-retaliatory immunity

The *Declaration on Criteria for Free and Fair Elections* accordingly emphasizes that electoral complaints should be resolved by "an independent and impartial authority."[434] The same foundational principles of objectivity, independence, neutrality, and impartiality—which should characterize the electoral dispute resolution system as a whole—also apply to the investigative process.

International guidelines state that investigators and investigative bodies are obliged to "maintain objectivity, impartiality, and fairness throughout the investigative process and conduct [their] activities competently and with the highest levels of integrity,"[435] a duty that extends to individuals and institutions responsible for investigating electoral disputes. Without structural and procedural safeguards to ensure independence and impartiality, public perception that election investigations favor a particular side in a dispute could endanger the democratic legitimacy and the credibility of the entire electoral process.

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431 *See generally* GUARDE, *supra* note 1, at 37–50; CARTER CENTER, GUIDE TO ELECTORAL DISPUTE RESOLUTION 10–28 (Jan. 2010), http://www.cartercenter.org/resources/pdfs/news/peace_publications/conflict_resolution/Election-Dispute-Guide.pdf.

432 General Comment No. 32, *supra* note 374, ¶ 19.

433 OHCHR MANUAL, *supra* note 374, at 113–154.

434 Inter-Parliamentary Council, DECLARATION ON CRITERIA FOR FREE AND FAIR ELECTIONS art. 4, ¶ 9 (Mar. 26, 1994), http://www.ipu.org/cnl-e/154-free.htm.

435 CONFERENCE OF INTERNATIONAL INVESTIGATORS, UNIFORM GUIDELINES FOR INVESTIGATIONS ¶ 3 (2d ed. 2009), http://www.un-.org/Depts/oios/investigation_manual/ugi.pdf; *cf.* UNDP, LEGAL FRAMEWORK FOR ADDRESSING NON-COMPLIANCE WITH UN STANDARDS OF CONDUCT ¶ 74 (2010), http://www.undp.org/content/dam/undp/documents/about/transparencydocs/UNDP_Legal_Framework_for_Addressing_Non_compliance_with_UN_Standards_of_Conduct.pdf ("All investigators . . . shall be independent. They have a duty of objectivity, thoroughness, ethical behavior, and observance of legal and professional standards.").

## Fairness

Along with other aspirational values, such as transparency and accountability, fairness is often considered to be a fundamental principle of any investigatory process, including election investigations. For example, the United Nations General Assembly has emphasized the "principle of fairness on the part of those with responsibility for investigation functions."[436] The United Nations' *Basic Principles on the Independence of the Judiciary* states: "The principle of independence of the judiciary entitles and requires the judiciary to ensure their judicial proceedings are conducted fairly."[437] As the Office of the High Commissioner for Human Rights explains, "judges have an obligation to decide the cases before them according to the law, protect individual rights and freedoms, and constantly respect the various procedural rights that exist under domestic and international law."[438] Likewise, the OSCE considers independence to be "a pre-condition" for the "fair" handling of election-related disputes.[439]

No international consensus, however, exists regarding a comprehensive definition of "fairness." Fortunately, the Human Rights Committee's General Comment No. 32 can offer some helpful guidance, according to which fairness "entails the absence of any direct or indirect influence, pressure or intimidation or intrusion from whatever side and for whatever motive."[440] Moreover, any "manifestations of hostility" or "expressions of racist attitudes" adversely affect fairness.[441] The *International Code of Conduct for Public Officials* further emphasizes that public officials should "be attentive, fair and impartial in the performance in their functions…They shall at no time afford any undue preferential treatment to any group or individual or improperly discriminate against any group or individual, or otherwise abuse the power and authority vested in them."[442] **Bhutan's** *Election Dispute Settlement Manual* appropriately reflects this principle when it instructs that "the investigator should not pass

436 G.A. Res. 59/287, ¶ 2, U.N. Doc. A/RES/59/287 (Apr. 12, 2005).

437 Basic Principles on the Independence of the Judiciary, *supra* note 112.

438 OHCHR Manual, *supra* note 374, at 134 (commenting on Art. 6 of the Basic Principles on the Independence of the Judiciary).

439 Petit, *supra* note 104, at 10.

440 General Comment No. 32, *supra* note 374, ¶ 25.

441 *Id.* ¶ 25.

442 International Code of Conduct for Public Officials, G.A. Res. 51/59, Annex ¶ I(3), U.N. Doc. A/RES/51/59 (Dec. 12, 1996) [hereinafter International Code of Conduct for Public Officials].

any judgment or remark which is prejudicial in nature."[443] This guidance highlights the importance that the notion of impartiality can play in developing perceptions of fairness in the investigation process.

Several other countries have incorporated notions of fairness in their policies. The **Australian** Electoral Commission's Complaint Management Policy, for example, provides that investigators should be guided by an adherence to the principle of fairness, which is defined as a management of complaints fairly and with integrity but also includes impartiality and respect for all complainants.[444]

## Objectivity

Objectivity refers to impartiality in carrying out public duties.[445] Furthermore, there are two aspects of objectivity that must be considered when developing effective investigation regimes: institutional objectivity and individual investigator objectivity.[446] It is also important for investigators to consider both real and perceived impartiality, given the influence that public perceptions can have on the acceptance of investigation and adjudication outcomes.

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443 Bhutan Election Dispute Settlement Manual, *supra* note 27, ¶ 6.11.

444 Australia, Complaints Management Policy ¶ 4.

445 *See* Gilman, *supra* note 364; *cf.* OHCHR Manual, *supra* note 374, at 139 (similarly equating objectivity and impartiality by stating that the "notion of impartiality of the judiciary . . . means that all the judges involved must act objectively.").

446 *See Valente v. The Queen*, [1985] 2 S.C.R. 673 (Can.); Office of the High Comm'r for Human Rights, *Independence and Impartiality of Judges, Prosecutors and Lawyers*, in Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers 119 (2003) (In a passage from the prominent *Valente v. The Queen* decision, the Canadian Supreme Court summarizes the general understanding of objectivity or impartiality under both Canadian constitutional law and international human rights law. Commenting on the right to an independent and impartial judiciary, the Court states that this notion "connotes not only a state of mind but also a status or relationship to others . . . rest[ing] on objective conditions or guarantees." It "involves both individual and institutional relationships: the individual independence of a judge . . . and the institutional independence of the court."); General Comment No. 32, *supra* note 374, ¶ 21 (the Human Rights Committee affirms that the "requirement of impartiality has two aspects," both an individual and a structural dimension: "First, judges must not allow their judgment to be influenced by personal bias or prejudice, nor harbor preconceptions about the particular case before them, nor acts in ways that improperly promote the interests of one of the parties to the detriment of the other. Second, the tribunal must also appear to a reasonable observer to be impartial."); *El-Masri v. Former Yugoslav Republic of Macedonia*, App. No. 39630/09, 2012-VI Eur. Ct. H.R. 263, ¶ 184 (The Court suggests that objectivity is not only the absence of a hierarchical or institutional connection, but also independence in practical terms."); *See also Volkov v. Ukraine*, App. No. 21722/11 Eur. Ct. H.R. ¶ 104 (2013) (Reaffirming its decision in *El-Masri v. Former Yugoslav Republic of Macedonia*, the Court stated that any analysis of the objectivity of an election investigation must contemplate "whether the tribunal itself . . . offer[s] sufficient guarantees" of its independence and if the "personal conviction and behavior" of the individual investigator holds "any personal prejudice or bias in a given case.").

### *Objectivity of the Investigation Body*

Independence can refer to the formal structural independence from other branches of government. Guarantees of structural independence can only be secured by constitution or statute.[447] Although structural independence is an important indicator of objectivity or impartiality, it is essential to keep in mind that the institutions responsible for investigating electoral challenges can be independent in name but not in nature. This can become a particular problem in countries in which an independent election commission conducts the investigation and resolution of complaints because such a system "concentrates electoral power in one single body, creating the risk of eventual abuses without checks by a different body."[448] In **Indonesia**, for example, the authority of Bawaslu (the Election Supervisory Body) to both supervise electoral conduct and to investigate and resolve disputes has led to the perception that the institution lacks necessary neutrality.[449]

International experts have recognized, however, that investigations occurring in mixed models of electoral management can nevertheless demonstrate independence and impartiality.[450] For these reasons, the second dimension of independence—the normative idea of independence of action—becomes "more important than the formal 'structural' independence."[451] Investigative bodies should strive to adopt a culture of independent decision-making regardless of their structural composition. Both strong leadership and involvement of civil society can contribute to instilling an institutional ethos of independence of action.[452]

As the European Court of Human Rights has repeatedly affirmed, in addition to structural and normative independence, another important element

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447 *See generally* Orozco-Henríquez et al., *supra* note 101, at 90–91 (providing examples of constitutional and statutory provisions ensuring independence for election dispute resolution systems in regular courts, constitutional courts, administrative courts, specialized electoral tribunals, and electoral management bodies).

448 *Id.* at 136 (discussing the advantages and disadvantages of different types of electoral dispute resolution systems, including an electoral management body with judicial powers).

449 Internal survey response from an Indonesian election specialist (Jun. 17, 2013) (on file with IFES).

450 *See* Orozco-Henríquez et al., *supra* note 101, at 88; *see also* Wall et al., *supra* note 366, at 22–23.

451 Wall et al., *supra* note 366, at 22.

452 *Cf. id.* at 23; *see generally* IFES, Leadership in Crisis: Ensuring Independence, Ethics and Resilience in the Electoral Process (2020), https://www.ifes.org/sites/default/files/leadership_in_crisis_ensuring_independence_ethics_and_resilience_in_the_electoral_process_2.pdf.

of institutional objectivity is the *appearance* of independence.[453] As the Court further explained, "'justice must not only be done, it must also be seen to be done. What is at stake is the confidence which the courts in a democratic society must inspire in the public."[454] International Institute for Democracy and Electoral Assistance (IDEA)'s *Code of Conduct for the Ethical and Professional Administration of Elections* reflects a similar sentiment: "The public will measure the legitimacy of an election on the basis of both the actual integrity of its administration, and the appearance of integrity of the election process."[455] Transparency is one way to strengthen the perception of an investigative body's independence and to promote public trust in the legitimacy of the investigative process.

> Justice must not only be done, it must also be seen to be done.
>
> European Court of Human Rights
> *Volkov v. Ukraine*

The international community has repeatedly recognized, as the United Nations General Assembly has affirmed, that "transparency is a fundamental basis for free and fair elections."[456] The Venice Commission's *Code of Good Practice in Electoral Matters* similarly attests that the proper administration of the electoral process depends not only on impartiality and independence from political manipulation but also on the related principle of transparency.[457] Likewise, as the Inter-Parliamentary Council's *Declaration on Criteria for Free and Fair Elections* emphasizes, "[s]tates should take all necessary and appropriate measures to ensure the transparency of the entire electoral process."[458] Simply put, the commitment to transparency must extend to investigations, an essential element of the electoral process.

An independent investigation of alleged electoral irregularities, however,

453 Volkov v. Ukraine, App. No. 21722/11 Eur. Ct. H.R. ¶ 103 (2013); *accord, e.g.*, Incal v. Turkey, 4 Eur. Ct. H.R. 1571 (1998) (same).

454 Volkov, App. No. 21722/11 Eur. Ct. H.R. ¶ 106.

455 Int'l Inst. for Democracy & Electoral Assistance, Code of Conduct for the Ethical and Professional Administration of Elections 8 (1996).

456 G.A. Res. 66/163, ¶ 16 (pmbl.), U.N. Doc A/RES/66/163 (Apr. 10, 2012).

457 *See* Venice Commission, Code of Good Practice in Electoral Matters: Guidelines and Explanatory Report, ¶ 68, 52nd Sess., Op. No. 190/2002 (May 23, 2003).

458 Inter-Parliamentary Council, Declaration on Criteria for Free and Fair Elections art. 4, ¶ 7 (Mar. 26, 1994), http://www.ipu.org/cnl-e/154-free.htm.

is often not transparent to the public because transparency conflicts with its duty to secure confidentiality in the investigative context.[459] The UNDP *Guidelines for Investigations* assert that confidentiality is necessary during the investigation process—so much so that the "requirement for confidentiality extends equally to investigators, management, staff members and other personnel, investigation participants, and investigation subjects."[460] Accordingly, the *Uniform Guidelines for Investigations* instruct investigative authorities to "take reasonable measures to protect as confidential any non-public information associated with an investigation, including the identity of the parties that are the subject of the investigation and of parties providing testimony and evidence."[461]

> "Independence" embraces two different concepts: (1) structural independence from the government; and (2) "fearless independence"—not bending to governmental, political or other partisan influences on decisions.
>
> *Excerpt from the ACE Electoral Knowledge Network: http://aceproject.org/ace-en/topics/em/default*

Many states have enacted statutory provisions that ensure confidentiality in the course of an electoral investigation. **Indonesian** regulations, for example, plainly state that an investigation is "confidential in nature, as long as there are no decisions made by a plenary."[462] In **Bhutan**, the *Election Dispute Settlement Rules and Regulations* specify: "The decision-making authorities shall ensure that the confidentiality of the name of complainant, if necessary, shall be upheld and witness protection, if requested, provided as per the laws of the Kingdom of Bhutan."[463] The **Australian** Electoral Commission also guarantees confidentiality in the management of a complaint and refers back to the commission's privacy policy.[464] In **Hong Kong**, the regulations of

459 Steve Bickerstaff, *Contesting the Outcome of Elections*, in International Election Principles: Democracy & the Rule of Law 307–346, 312 (John Hardin Young, ed., 2009) (distinguishing between an election contest and the independent investigation of alleged electoral irregularities).

460 UNDP Investigation Guidelines 2012, *supra* note 6, ¶ 3.

461 Uniform Guidelines 2009, *supra* note 25, ¶ 12.

462 Bawaslu Regulation No. 14/2012, *supra* note 173, art. 14(3).

463 Bhutan Election Dispute Settlement Rules and Regulations, *supra* note 28, ¶ 9.5.

464 Australian Election Complaints Management Policy, *supra* note 8.

the complaints procedure guarantee that: "All personal particulars of a complainant will be treated in strict confidence."[465]

Thus, the key tension relates to how investigative authorities can reconcile the seemingly competing obligations of transparency and confidentiality. To do this, investigators should take steps to inform the public about the investigative process while simultaneously protecting the confidentiality of individual investigations. For example, once each matter is resolved, investigative records should be made available in a public archive.[466] Relevant stakeholders may also share information with the public through awareness campaigns. For example, prior to the 2008 elections, the Election Commission of **Bhutan** used print, audio, and visual media, along with one-on-one classroom sessions in villages, to carry out a multi-faceted civic education strategy. These campaigns, as well as separate briefings for candidates and political parties, permitted the Election Commission to explain the dispute resolution process to the public, among other things.[467] Election commissions conducting similar voter education campaigns could explain the investigation process as part of their outreach efforts.

### Balancing Transparency and Confidentiality

Investigative authorities must reconcile the seemingly competing obligations of transparency and confidentiality. Through openness and transparency in their work, investigative bodies can enhance their credibility, demonstrate their impartiality, and entrench their institutional independence.

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Investigative bodies should publish internal guidelines and other procedural documents, such as manuals or codes of conduct, that govern their work.

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465 Hong Kong, Complaints Handling Policy, at 19.

466 *See generally supra* "thoroughly", p. 26 (discussing the requirement of accurate record-keeping and document retention).

467 Orozco-Henríquez et al., *supra* note 101, at 120–21.

The former Commissioner of Canada Elections highlights the importance of this practice in the preface to the *Special Investigators' Manual*. Describing the objective of the manual, he writes:

> This manual also discloses to the public how electoral investigations are carried out. It is important that the role of the Commissioner of Canada Elections and that of Special Investigators be clear and bear the scrutiny of all those interested in electoral matters. This openness and transparency should help to maintain and promote the confidence and trust of all Canadians in the integrity of the electoral process.

Through openness and transparency in their work, investigative bodies can enhance their credibility, demonstrate their impartiality, and entrench their institutional independence.

### *Objectivity of the Investigator*

The United Nations General Assembly's *Basic Principles on the Independence of the Judiciary* stress that impartial decision-makers should act "without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[468] The Human Rights Committee has echoed this standard, emphasizing that the notion of impartiality "implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties."[469]

The standards that apply to the judiciary can be extrapolated to investigators, who have a similar duty to protect the integrity of the investigation and dispute resolution process. To act objectively, "without bias or prejudice," investigators must not allow their personal opinions and, in particular, their political views to impact their actions in investigation proceedings.[470] Like civil

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468 Basic Principles on the Independence of the Judiciary, *supra* note 112; *accord* Inter-American Comm'n on Human Rights, Annual Report of the Inter-American Commission on Human Rights 1996, O.A.S. Doc. OEA/Ser.L/V/II.95, Doc. 7 rev. at 761 (Mar. 14, 1997) (recommending to OAS Member States that "judges must be free to decide matters before them without any influence, inducements, pressures, threats or interferences, direct or indirect, for any reason or from any quarter").

469 H.R.C. Communication No. 387/1989, Karttunen v. Finland, ¶ 7.2, U.N. Doc. CCPR/C/46/D/387/1989 (Nov. 5, 1992).

470 *Objective*, Black's Law Dictionary (9th ed. 2009); *cf.* Int'l Civil Serv. Comm'n (ICSC), Standards of Conduct for the International Civil Service ¶ 9 (2001), http://www.un.org/en/ethics/pdf/StandConIntCivSE.pdf [hereinafter Standards of Conduct for the International Civil Service], ("Impartiality implies tolerance and restraint, particularly in dealing with political . . . convictions.").

servants, election investigators "do not have the freedom of private persons to take sides or to express their convictions publicly."[471] Instead, investigators should "treat all participants equally, fairly and even-handedly, without giving any advantage to any political tendency or interest group."[472]

> Special Investigators are expected to be, and perceived to be, impartial; therefore, they should not be or have been actively or publicly engaged in the support or opposition of the election of any federal or provincial political party or candidate for elective office, nor any federal or provincial referendum committee.
>
> Canadian *Special Investigators' Manual*

By subscribing to the principle of political non-partisanship, election investigators can inspire public confidence in the credibility of the investigative process and increase the likelihood of acceptance of electoral dispute resolutions, especially among parties on the losing side. Many states include general provisions that compel investigators to act impartially and independently. In **South Africa**, for example, the members of the Electoral Commission responsible for investigations "shall serve impartially and independently and perform [their] duties as such in good faith and without fear, favour or prejudice."[473] Similarly, in **Mexico**, the governing principles for all employees of the Federal Electoral Institute include "independence, impartiality, and objectivity."[474]

To further ensure non-partisanship, some states also limit the extent to which current or past investigators can participate in the political process. The Canadian Investigators' Manual holds that special investigators in **Canada** should refrain from actively or publicly supporting or opposing a particular candidate or party.[475] Likewise, **Bhutan** bans investigators from participating in campaigning or electioneering activities on behalf of any candidate or political party.[476]

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471 Standards of Conduct for the International Civil Service, *supra* note 471.

472 Wall et al., *supra* note 366, at 23 (defining impartiality in the context of electoral administration).

473 Electoral Commission Act 51 of 1996 § 9(1)(a) (S. Afr.).

474 Constitución Política de los Estados Unidos Mexicanos [C.P], art. 41(D)(V), *as amended*, Diario Oficial de la Federación [DO], 13 de Noviembre de 2007 (Mex.).

475 Canadian Investigators' Manual Ch. 2, *supra* note 322, at 2.

476 *See* Election Comm'n of Bhutan, Code of Conduct for Election Officers ¶ 11 (Mar. 10, 2013).

Similarly, to insulate elections from political pressure and to preempt conflicts of interest, many states include incompatibility requirements in their relevant election laws. Such provisions prevent individuals from certain designated groups from participating in electoral administration. Some countries strive to instill an even higher degree of impartiality by preventing investigators from holding another position altogether. The **Mexican** Constitution, for example, forbids Electoral Councilors (who are ultimately responsible for the administration of elections, including the investigation of disputes and violations) from holding any other employment, job, or commission. [477] Likewise, in the **Philippines**, members of the Commission on Elections, who oversee investigations, cannot hold any other office or employment during their tenure.[478]

Despite the indisputable importance of laws and regulations, "impartiality is a state of mind more than a statement in law."[479] Legal requirements for election investigators to act independently and impartially mean little in isolation. In addition to the competency and professionalism elements discussed under Principle 3, it is important for the relevant investigative authorities to also put into place provisions that prevent conflicts of interest and implement recruitment, promotion, and compensation policies that promote the independence and impartiality of investigators, as discussed in the subsequent sections.

## Conflicts of Interest

The OECD defines a conflict of interest as any "conflict between the public duty and the private interest of a public official, in which the official's private-capacity interest could improperly influence the performance of their official duties and responsibilities."[480]

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477 Constitución Política de los Estados Unidos Mexicanos [C.P], art. 41(D), *as amended*, Diario Oficial de la Federación [DO], 13 de Noviembre de 2007 (Mex.).

478 Administrative Code of 1987, Exec. Ord. No. 292, § 25 (Jul. 25, 1987) (Phil.).

479 Wall et al., *supra* note 366, at 23.

480 Org. for Econ. Co-operation & Dev. (OECD), Managing Conflict of Interest in the Public Sector: A Toolkit 13 (2005), http://www.oecd.org/gov/ethics/49107986.pdf [hereinafter Managing Conflict of Interest in the Public Sector: A Toolkit].

In General Comment No. 32, the Human Rights Committee recognizes that it is necessary to protect judges against conflicts of interest in order to safeguard their independence.[481] Extending this principle to elections, the European Court of Human Rights similarly concludes: "One of the guarantees of election commissions' independence is that persons who could be involved in an inherent conflict of interest should not be allowed to be appointed to electoral commissions...."[482]

Like all electoral standards and procedures,[483] states should clarify conflicts of interest in their electoral laws, regulations, and policies. The relevant authorities should provide clear, realistic descriptions of the circumstances and relationships that can lead to conflicts of interest. They should ensure that investigators fully understand their duty to identify, declare, and manage conflicts of interest.[484]

States can address conflicts of interest among election investigators in various ways. Most broadly, they can include conflict of interest provisions into general administrative laws that apply to all public servants, including election investigators. In **Ukraine**, for example, the *Code of Conduct for Public Officials* obliges investigators to "use exhaustive measures" to avoid conflicts of interest and "not allow actions or inaction that may cause a conflict or create an impression of one."[485] Likewise, in **Pakistan**, the *Government Servants (Conduct) Rules of 1964* and the *Government Servants (Efficiency and Discipline) Rules of 1974* apply to electoral commission officials.[486]

Alternatively, states can include conflict of interest provisions into their electoral laws or regulations, as in **South Africa**. Finally, states can also include provisions about conflicts of interest into the electoral codes of conduct.[487]

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481 General Comment No. 32, *supra* note 374, ¶ 19.

482 Georgian Labour Party v. Georgia, App. 9103/04 Eur. Ct. H.R. ¶ 68 (2008) (reviewing conflict of interest provisions in the electoral laws of Belgium, Bosnia and Herzegovina, the Czech Republic, Germany, Hungary, Moldova, Portugal, Serbia, Spain, and the United Kingdom).

483 *See generally* GUARDE, *supra* note 1, at 24–37 (describing the necessity for a clearly defined regimen of electoral standards and procedures).

484 *See generally* OECD Guidelines for Managing Conflict of Interest in Public Service §§ 1.1–1.2, in MANAGING CONFLICT OF INTEREST IN THE PUBLIC SECTOR: A TOOLKIT, *supra* note 481, at 95.

485 Code of Conduct for State Officials, No. 4722-VI (Ukr.), http://zakon4.rada.gov.ua/laws/anot/en/4722-17.

486 Internal survey response from IFES legal team in Pakistan (Jun. 18, 2013) (on file with IFES).

487 *See generally* WALL ET AL., *supra* note 366, at 73 (noting that the avoidance of conflicts of interest is a basic issue often included in electoral codes of conduct).

Once defined in the laws, regulations, and/or codes of conduct, investigator conflicts of interest must be disclosed. As the *Uniform Guidelines for Investigations* reflect, the management of conflicts of interest is a basic principle for all investigations. An investigator has a duty to voluntarily "disclose to a supervisor in a timely fashion any actual or potential conflicts of interest he or she may have in an investigation in which he or she may be participating."[488] In so doing, investigators can "preserve and enhance public confidence in their own integrity and that of their organization."[489] Furthermore, the management of conflicts of interest can help guard against corruption. The *Convention Against Corruption* provides that each state party should take measures to "strengthen integrity and to prevent opportunity for corruption among [its] members...."[490] By addressing conflicts of interest, states can ensure that election investigators are "able to perform all of their professional functions without...improper interference." [491]

There are two related reasons for managing conflicts of interest. First, by curbing conflicts of interest, investigative authorities can prevent a situation that could negatively impact investigation. An investigator preoccupied by personal interests, for example, could fail to act competently or could neglect to properly analyze the evidence, thereby compromising the investigation. Second, the elimination of conflicts of interest aims to avoid a situation in which an onlooker might suspect that the integrity of the investigation has been compromised—that is, to avoid the appearance of impropriety.

A variety of situations can give rise to a conflict of interest.[492] As the *Pinochet* case in **Chile** demonstrates, family relationships and personal interests can be key indicators of potential conflicts of interest.[493] Other grounds for conflicts of interest include "having prejudice or a strong bias, that is, a preconceived

488 Uniform Guidelines 2009, *supra* note 25, ¶ 4; *accord* Standards of Conduct for the International Civil Service, *supra* note 471, ¶ 22 (stating that civil servants "should also voluntarily disclose in advance possible conflicts of interest that arise in the course of carrying out their duties").

489 Standards of Conduct for the International Civil Service, *supra* note 471, ¶ 22.

490 U.N. Convention Against Corruption, art. 11(1–2), *adopted* Oct. 31, 2003, 2349 U.N.T.S. 41 (effective Dec. 14, 2005) [hereinafter Convention Against Corruption].

491 U.N. Guidelines on the Role of Prosecutors, *supra* note 320, § 4 (the United Nations Guidelines on the Role of Prosecutors emphasize the importance of allowing prosecutors to "perform their professional functions without intimidation, hindrance, harassment, or improper interference").

492 *See generally* Managing Conflict of Interest in the Public Sector: A Toolkit, *supra* note 481, at 74–95 (providing 16 training case studies of different situations and the conflict of interest issues that could arise).

493 *In re Pinochet* [1999], UKHL 1, [1] (appeal taken from Eng.).

judgement [sic] formed without a factual basis" or otherwise "having made promises that imply partiality in favour of or against an interested person or party.[494] In this spirit, the *Convention Against Corruption* obligates states to adopt legislative and other measures in order to criminalize the following intentional acts by a public official:

> (a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties; (b) the solicitation or acceptance…directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.[495]

Another type of conflict of interest involves "having accepted gifts, services or invitations paid for by the interested persons or their representatives."[496] In **Bhutan**, for example, an Election Officer must not accept any gift from a political party, organization, or person involved in the election process.[497] An investigator's acceptance of gratuities in exchange for any advantage or favor prevents the investigation body from executing its mandate and should, therefore, be considered an offense that requires disciplinary action.[498]

Finally, conflicts of interest often involve financial, business-related, or profit-making components. The United Nations' *Staff Regulations and Rules* define a conflict of interest in these terms:

> A staff member who has occasion to deal in his or her official capacity with any matter involving a profit-making business or other concern, including a concern in which he or she holds a financial interest, directly or indirectly, shall disclose that interest to the Secretary-General and…either dispose of that financial interest or

494 Orozco-Henríquez et al., *supra* note 101, at 109 (discussing possible conflicts of interest that could constitute grounds for the disqualification of a member of an electoral dispute resolution body).

495 Convention Against Corruption, *supra* note 491.

496 Orozco-Henríquez et al., *supra* note 101, at 109.

497 Election Comm'n of Bhutan, Code of Conduct for Election Officers ¶ 8 (Mar. 2013).

498 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 27.

> formally excuse himself or herself from participating with regard to any involvement in that matter which might give rise to the conflict of interest situation.[499]

The *International Code of Conduct for Public Officials* similarly provides that public servants should, "in accord with their position and as permitted or required by law and administrative policies, comply with requirements to declare or to disclose personal assets and liabilities...."[500] Consequently, some states impose an obligation on investigators and members of election dispute resolution bodies to submit statements of net worth at various points throughout their tenure. To facilitate reporting, **Bhutan's** Anti-Corruption Commission staff has developed an online asset declaration system through which all civil servants report assets annually.[501]

The assorted provisions discussed in this section highlight another important element that is critical for the management of conflicts of interest. Not only do investigators have a duty to disclose potential conflicts of interest but they also have the related responsibility to resolve these conflicts in one of two possible ways—either by removing the conflicting interest or by recusing themselves from the relevant investigation.

Finally, "to be effective, realistic enforceable sanctions for breaches of conflict of interest provisions are necessary, such as dismissal or other disciplinary action."[502] The requirement for investigators to disclose and resolve conflicts of interest largely rings hollow without mechanisms that would hold investigators accountable to these rules. In the **Philippines**, for example, possible sanctions include suspension, fines, and even imprisonment.[503]

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499 U.N. Staff Rules: Staff Regulations of the United Nations and Provisional Staff Rules ¶ 1.2(p), U.N. Doc. ST/SGB/2009/7 (Oct. 21, 2009); *see also id.* ¶ 1.2(m) (further defining a "conflict of interest" in financial terms, stating: "Staff members shall not be actively associated with the management of, or hold a financial interest in, any profit-making, business or other concern, if it were possible for the staff member or the profit-making, business or other concern to benefit from such association or financial interest by reason of his or her position with the United Nations.").

500 International Code of Conduct for Public Officials, *supra* note 443.

501 *See* Nat'l Council of Bhutan, Asset Declaration 2014, http://www.nationalcouncil.bt/vacancy/ (last visited May 28, 2020).

502 Wall et al., *supra* note 366, at 69.

503 Code of Conduct and Ethical Standards for Public Officials and Employees, Rep. Act. No. 671, § 11(a) (Phil.).

## Integrity and Incorruptibility

States should promote electoral integrity and effective practices that are aimed at prevention of corruption within the election process by first instituting clearly defined laws, regulations, and policies applicable to investigations. States should also ensure proper and transparent selection and compensation processes for investigators and adopt mechanisms that prevent and combat corruption within an investigative body.

### *Recruitment and Promotion*

International guidelines repeatedly emphasize that individuals selected for investigative and adjudicative processes should possess "integrity and ability with appropriate training or qualifications."[504] Thus, irrespective of other methods of selection, a candidate's professional qualifications and personal integrity should constitute the main criteria for selection.[505] These principles should be enshrined in public service and electoral laws and in the enacting legislation of an investigative body. In addition to the qualifications reinforcing the competence and professionalism of investigators, discussed in the above section *Principle 3: Effectively*, legal provisions related to the recruitment of investigators could:

- Establish selection procedures that ensure investigators are not beholden to any individual or group;[506]
- Identify criteria for recruitment that focus on individual merit and integrity;[507]
- Provide safeguards against improper motives for recruitment;[508] and
- Incorporate considerations of potential conflicts of interest.[509]

Elections **Canada**, for example, screens candidates for special investigators on the basis of professional qualifications, current obligations or commit-

504 U.N. Guidelines on the Role of Prosecutors, *supra* note 320, § 1.

505 OHCHR Manual, *supra* note 374, at 123.

506 Orozco-Henríquez et al., *supra* note 101, at 95.

507 *Id.* at 97.

508 Basic Principles on the Independence of the Judiciary, *supra* note 112.

509 *See, e.g.*, Orozco-Henríquez et al., *supra* note 101, at 112.

ments, and potential conflicts of interest.[510] All investigative bodies should have similarly transparent mechanisms for recruiting investigators and support staff. This principle is particularly important for temporary dispute resolution or investigative bodies that are solely established for the purpose of adjudicating election petitions.

Executive offices often control, to varying degrees, the appointment of senior leadership members in investigative bodies who exercise oversight and can play a role in the recruitment and appointment of investigators. However, to build public confidence and strengthen the independence of an election investigation institution, it is critical to employ transparent procedures and external checks on political appointments.

The recruitment process for investigators should also be independent from political considerations and subject to external oversight, to the extent that this serves to assist in the hiring of competent, independent staff and to protect against irregularities.[511] This oversight from governing authorities, however, should only extend to a review of the selection process, while the appointments and promotions of non-senior officials should be regarded as an internal institutional matter. In **Canada**, for example, the government appoints the Elections Canada Commissioner but the Special Investigators, who actually conduct election investigations, are hired under a contractual agreement.[512] Since they are not employed in public service, they are not subject to public administration laws; instead, electoral laws and regulations regulate their conduct. The selection process for Special Investigators involves consultation with senior managers in Canadian law enforcement and security agencies.[513]

Promotions within an investigative body should solely be based on "objective factors, in particular professional qualifications, ability, integrity and experience, and decided upon in accordance with fair and impartial procedures."[514] Improper factors to consider when hiring and promoting include

510 Canadian Investigators' Manual Ch. 2, *supra* note 322, at 2.

511 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 116.

512 Canadian Investigators' Manual Ch. 2, *supra* note 322, at 1.

513 *Id.* at 2.

514 U.N. Guidelines on the Role of Prosecutors, *supra* note 320, §§ 3–7. ("In order to ensure that prosecutors are able to carry out their professional responsibilities independently and in accordance with these standards, prosecutors should be protected against arbitrary action by governments."); *see also* Basic Principles on the Independence of the Judiciary, *supra* note 112 ("promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience").

political affiliation, patronage, gender, race, ethnicity, and religious beliefs.[515] The **Philippines** has established a system of incentives and rewards for public servants, including bonuses, citations, and promotions, to motivate them to "uphold the highest standards of ethics."[516] As such, the country's *Code of Conduct and Ethical Standards for Public Officials and Employees* provides that each government agency, including the Commission on Elections, must form committees to conduct periodic performance reviews and employ measures that demonstrate recognition for "outstanding merit."[517] These committee determinations are required to consider, *inter alia*, years of service, quality and consistency of performance, skill level of the position, salary level, achievements, and the "risks or temptations inherent in the work."[518]

A transparent recruitment and promotion system, based on objective factors and pre-established benchmarks, can help ensure that investigators are not beholden to any individuals or interest groups. While these decisions should be made without political consideration or interference, external oversight of the selection process is necessary in order to build public confidence in the impartiality of investigators and to ensure that the investigative body is held accountable to its established standards and procedures.

### *Compensation*

Extrapolating from the guidelines for judges, investigative bodies should also ensure adequate remunerations and pensions, where applicable, for investigators.[519] Fair and adequate remuneration is vital to promoting integrity because it attracts qualified persons to investigative bodies and may also make investigators less likely to engage in bribery or corruption.[520]As a matter of public policy and effective management, investigative bodies should compensate investigators on a scale that is appropriate to the importance of their function and the level of professionalism required. Other incentives for retaining qualified and committed investigators include opportunities for

515 OHCHR Manual, *supra* note 374, at 129.

516 Code of Conduct and Ethical Standards for Public Officials and Employees, Rep. Act. No. 671, § 6 (Phil.).

517 *Id.*

518 *Id.*

519 Basic Principles on the Independence of the Judiciary, *supra* note 112 ("judges shall have adequate remuneration and pensions"); *see also* OHCHR Manual, *supra* note 374, at 123.

520 OHCHR Manual, *supra* note 374, at 128.

training and professional development, adequate vacation leave, as well as health and life insurance benefits.

To further guard against the application of political pressure during an electoral investigation—regardless of whether or not an investigative body is permanent—states should provide for investigators' job security, at least during the course of the institution's existence, as a guarantee of their independence and commitment.[521] Similar guarantees are emphasized in international guidelines on the role of judges[522]—judges who investigate complaints as part of their duties should, accordingly, have security of position. While considerations for the security of tenure are different for investigators who also hold other positions, such as election officials or staff members, there should be institutional guarantees for continued employment during an election process, barring reasonable causes for dismissal.

### *Eliminating Opportunities for Corruption*

One approach to reducing opportunities for corruption within an investigation body is to remove specific types of investigative decisions from the authority of investigators.[523] The American Bar Association's *Standards for Prosecutorial Investigation* support this measure, noting that "generally, the prosecutor engaged in an investigation should not be the sole decision-maker" for determinations that are material to the investigation.[524] In **Bhutan**, for example, members of an Investigation Committee cannot participate in the decision-making process of the Central Election Dispute Settlement Body (CEDSB).[525] Likewise, the Elections **Canada** Commissioner makes final decisions after reviewing the investigation report submitted by Special Investigators.[526] In **Afghanistan**, the 2014 complaints adjudication procedure clearly delineated between the legal team and investigators, on the one hand, and the arbiters, on the other.[527]

Internal and external reporting mechanisms also help prevent corruption

521 *See* Orozco-Henríquez et al., *supra* note 101, at 107.

522 Basic Principles on the Independence of the Judiciary, *supra* note 112.

523 *Cf.* OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 28 .

524 American Bar Association Standards for Prosecutorial Investigations, *supra* note 82, § 1.2(c).

525 Bhutan Election Dispute Settlement Rules and Regulations, *supra* note 28, ¶ 11.3.

526 Comm'r of Canada Elections, *Ch. 14 Assessment of Investigation Findings*, in Investigators' Manual, Appendices 1 (2000).

527 Afghanistan, Election complaints Commission, Procedure on Adjudication of complaints and objections art. 24.3.

within investigative bodies.[528] Internal oversight mechanisms should be established in order for an investigative body to monitor personnel performance and track operating budget expenditures, while external oversight institutions should review the performance of the body as a whole. The **Australian** Electoral Commission provides for both internal and external reviews of its decisions on complaints if the parties are not satisfied with its response or decision.[529] In addition, investigative bodies should establish measures to facilitate reporting of corrupt practices to appropriate authorities and to protect staff members from retaliation in response to speaking out.[530] As noted in the *Convention Against Corruption*, such measures "provide protection against any unjustified treatment" of an individual who "reports in good faith and on reasonable grounds to the competent authorities."[531] **Pakistan's** Election Commission, for instance, stipulates: "Investigators who are under high pressure, intimidated or under threat by individuals involved in a complaint shall disclose this information and refer the matter to their supervisor for investigation and/or for final decision."[532]

In general, ensuring adequate and appropriate accountability within the investigative process can reduce opportunities for corruption. This can be done by distributing the decision-making authority in order to create a check on the discretion of investigators as well as to ensure oversight by conducting internal and external performance reviews and by providing an opportunity for an external review of decisions.

## Functional and Non-Retaliatory Immunity

Election investigators have the right and duty to carry out investigations in good faith and in accordance with applicable laws, established professional duties, and recognized standards and ethics.[533] States should demonstrate that

528 *Cf.* OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 31.

529 Australian Election Complaints Management Policy, *supra* note 8.

530 OSCE Guidebook for Democratic Policing, *supra* note 336, ¶ 32.

531 Convention Against Corruption, supra note 491.

532 Handbook on the ECP Election Complaints Process, *supra* note 22, at 11.

533 U.N. Guidelines on the Role of Prosecutors, *supra* note 320, §§ 3–7 (prosecutors should be "able to perform their professional functions without unjustified exposure to civil, penal or other liability"); Basic Principles on the Role of Lawyers, *supra* note 376, ¶ 16 (government should do everything to ensure that lawyers "do not suffer, or be threatened with, prosecution or administrative, economic or other sanctions for any action taken in accordance with recognized professional duties, standards and ethics").

investigators have both functional and non-retaliatory immunity in order to ensure that they are able to perform their professional functions without undue interference, exposure to liability, or reprisals.[534]

> *Functional immunity* provides protection to investigators against criminal or civil sanctions related to professional actions made in good faith during the course of an investigation.[535]

> *Non-retaliatory immunity* refers to policies within an investigative body, or executive agencies that have authority over the investigative body, that provide protection from reprisals in the form of adverse employment action such as dismissal, decrease in compensation, poor work assignments, harassment, or threats of professional consequences.[536] Provision of these forms of immunity enables investigators working on politically complex and sensitive cases to execute their professional responsibilities independently while being protected from arbitrary actions by governments or other parties attempting to impose undue interference on an investigation.[537] States should also ensure that authorities physically protect investigators and their families when their personal safety is threatened as a result of the discharge of professional functions.[538]

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534 *See* Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, *supra* note 320, § 6 (While there are no internationally recognized due process guidelines specific to election investigators, it is possible to extend international due process principles for assessing the conduct of judges, prosecutors, and lawyers to these investigations. In this context, immunity connotes an investigator's autonomy to "perform professional functions without intimidation, harassment, improper interference, or unjustified exposure to administrative, civil, or penal liability.").

535 Basic Principles on the Role of Lawyers, *supra* note 376, ¶ 20 (lawyers shall enjoy "civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority"); *see also* OHCHR Manual, *supra* note 374, at 123.

536 *See* U.N. Handbook on Practical Anti-Corruption Measures for Prosecutors and Investigators, *supra* note 80, at 41. *See, e.g.*, *Retaliation,* U.S. Equal Employment Opportunity Comm., http://www.eeoc.gov/laws/types/retaliation.cfm (last visited Jan. 1, 2015) ("The law forbids retaliation when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, and any other term or condition of employment.").

537 *See generally* Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, *supra* note 320, § 6.

538 Basic Principles on the Independence of the Judiciary, *supra* note 112 ("Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions."); Basic Principles on the Role of Lawyers, *supra* note 376, ¶ 17 ("[W]here the security of lawyers is threatened as a result of discharging their functions, they will be adequately safeguarded by authorities."); U.N. Guidelines on the Role of Prosecutors, *supra* note 320, §§ 3–7.

In **Canada**, Special Investigators acting on "reasonable grounds" are covered under the immunity provisions of the country's Criminal Code.[539] In **Mexico**, the standard of non-retaliatory immunity is a continuing challenge. While high-level officials associated with investigations do enjoy immunity, low- and mid-level investigators at INE do not have immunity. Although IFES found that these investigators do not perceive the lack of protection as a barrier to performing their duties—as they are not in a position in which they are pressured by external or internal stakeholders—immunity should, nevertheless, be extended to all investigators.[540]

However, such immunity should be qualified. Given the nature of an investigator's mandate, a state should balance the need for immunity with its interest in accountability, and neither the state nor the investigator should undermine the integrity of the electoral process. Hence, immunity should not extend to conduct or behavior that is outside of the scope of professional duties and is properly subject to disciplinary action as established in the laws and regulations of a state.

## Conclusion

This Election Investigations Guidebook aims to support public officials and practitioners in addressing the unique challenges encountered in the investigation of electoral complaints and violations. Acknowledging that there is no single approach for every context, the four principles explored in this Guidebook should inform election investigative processes no matter the legal tradition, institutional structure, or procedural rules in place. Building on this Guidebook, IFES has developed training materials and exercises to help public officials and practitioners explore application of these principles and to develop their own procedures for election investigations, tailored to the country context.

For more information, please contact: info@ifes.org

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539 Criminal Code of Canada, R.S.C. 1985, c. C-46, § 25(1) ("Everyone who is required or authorized by law to do anything in the administration or enforcement of the law (a) as a private person, (b) as a peace officer or public officer, (c) in aid of a peace officer or public officer, or (d) by virtue of his office, is, if he acts on reasonable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose."); *see also* Canadian Investigators' Manual Ch. 2, *supra* note 322, at 5.

540 Vickery & Shein, *supra* note 169.

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