

**Election Elements:  
On the International Standards  
of Electoral Participation**

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and

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ELEMENTS OF THE ELECTORAL PROCESS:  
INTERPRETATIONS AND PRACTICES OF INTERNATIONAL BODIES  
ON ELECTION ELEMENTS DERIVABLE FROM ARTICLE 25 OF  
THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS  
AS CRITERIA FOR ASSESSING THE ELECTORAL PROCESS  
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## PREFACE

The increasing specificity of international human rights norms is evident also in the field of participation. In this field, elections have assumed a crucial role in indicating a country's position in terms of political and constitutional transition and in terms of the realization of human rights. Whilst many countries may, for a variety of reasons, wish to use their own interpretations concerning elections and political participation in running their national electoral system, those actors at the international level who engage themselves in election observation and try to assess the quality of the elections in different countries may use standards that are not explicitly tied to the international norms concerning elections. Yet the international norms concerning elections and the several election elements are fairly clear. This is so especially when regarded in the light of the pronouncements of, for instance, the different treaty bodies, which in their various decisions and opinions have determined the contents of these elements in a practical context.

In the first part of this book, written by Mr Markku Suksi, an attempt is made to create a methodological approach to elections with Article 25 of the International Covenant on Civil and Political Rights as the point of departure. By identifying the different election elements in the provision and by recognizing the systematic position of these election elements in relation to each others, an understanding of the cyclical nature of elections is created. In the second part of this book, written by Ms Veronika U. Hinz, a number of these election elements are explored in detail against the background of the interpretations of the various treaty bodies and other international human rights institutions. This detailed examination brings to the fore the more specific pronouncements that give concrete contents to the election elements and help create a link between the practical application of an election element and the international norm regulating the matter. This part of the book has been developed on the basis of the author's Master's Thesis in the European Master's Programme in Human Rights and Democratisation, approved in 2001.

Hence the authors wish to contribute to the creation of a practically oriented understanding of national elections in their international context. Because of the practical nature of this publication, it can hopefully be used for teaching purposes but also as an introductory manual for election observers of various categories concerning the position of international human rights law on elections. The authors hope that this publication can help to solidify an argumentation concerning elections which is grounded in the international human rights norms on participation. Ultimately, it is, of course, the

responsibility of the states to ensure compliance with the election elements included in human rights law by regulating these elements in national law.

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# THE ELECTORAL CYCLE: ON THE RIGHT TO PARTICIPATE IN THE ELECTORAL PROCESS<sup>1</sup>

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## 1. INTRODUCTION

Although Article 25 of the International Covenant on Civil and Political Rights (CCPR) is about participation, it does not mention the word democracy. In fact, very few human rights documents do. Hence Article 25, which is a binding norm at the level of international law within the framework of the United Nations' system of human rights, does not really inform the reader of its democratic potential, but concentrates on issues that may appear as rather loose. In spite of its rather innocent appearance, Article 25 contains issues that introduce a great number of all kinds of human rights aspects in the electoral process. It could hence be said that Article 25 deals with a number of more procedural issues on human rights in general and participation in particular and appears to leave the more 'substantive' issues aside. These seemingly procedural issues relate more or less directly even to the practical organization of elections in a country. Namely, Article 25 identifies elections as a central component of participation and defines a number of election-related elements as a minimum level of participation.

### *Article 25*

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country.

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<sup>1</sup> This article borrows especially examples from another article by the same author, namely from M. Suksi, 'Good Governance in the Electoral Process', to be published in G. Alfredsson and H-O. Sano (eds.), *Good Governance*. I wish to thank Ms Kati Frostell, Ms Barbro Gustafsson, Ms Veronika Hinz and Mr Anders Eriksson for their comments and Mr Rasmus Wikman for the graphics. A translation into Finnish of this article is included in *Kosmopolis* 4/2001.

Leaving aside paragraph (c) on the right of a person to access to public service in his or her country, the provision starts by formulating a right and an opportunity of every citizen, without any of the distinctions mentioned in Article 2 of the CCPR and without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. The Human Rights Committee of the United Nations has, in its General Comment on Article 25 of the CCPR, held that direct participation in the conduct of public affairs may imply that a person appears, for instance, as a voter in elections, as a voter in referendums, as a participant in local decision-making assemblies, as a member of legislative bodies, as a person holding executive office and as a member of a body which is established to represent citizens in consultation with government.<sup>2</sup> Although this list already makes reference to the possibility to act as a voter in elections, the role of elections in participation is highlighted by the expression 'through freely chosen representatives', that is, persons who are authorized to decide on issues on behalf of the citizens.

The way in which the representatives shall be chosen so that there is a free expression of the will of the people is established in paragraph (b) of Article 25. This paragraph can be understood as an operationalization of paragraph (a) as concerns direct participation in elections as a voter and as concerns the reference to freely chosen representatives. This operationalization actually defines what the CCPR understands with the term 'elections'. According to Article 25, there shall be the right and the opportunity '[t]o vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors'. This provision contains at least two different things. Firstly, it contains the necessary elements of elections; secondly, it is submitted here that the provision contains the idea of an electoral cycle or of a time-span during which the different elements of elections shall be implemented.

It is also important to mention what Article 25(b) does not contain. Firstly, it does not contain a definition of democracy, although it seems to have a preference for a representative system of government. Direct popular decision-making is, however, not excluded. Secondly, Article 25 does not prescribe any particular electoral system.

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<sup>2</sup> General Comment No. 25(57) concerning Article 25 of the CCPR, Report of the Human Rights Committee, Vol. I, UN doc. A/51/40, pp. 98-103. On the interpretation by the UN Human Rights Committee of the expression 'conduct of public affairs', see also Communication No. 205/1986, *Mikmaq People v. Canada*, views adopted on 4 November 1991, Report of the Human Rights Committee, UN doc. A/47/40, pp. 213-217.



As concerns the elements of election, it is possible to identify a number of distinct features, namely the right to vote, the right to stand as a candidate, genuine elections, periodic elections, universal suffrage, equal suffrage, secrecy of the ballot and the free expression of the will of the electors. As concerns the electoral cycle, it is possible to argue on the basis of paragraph (a) of Article 25 that the right to participate in the conduct of public affairs is a continuous right. It is possible to conclude that this continuous character of the right is present also within the framework of paragraph (b) of the Article, especially with reference to the periodic character of the elections. Against the 'periodic' background, it can be argued that in the context of elections, the election elements included in paragraph (b) of Article 25 can be organized in an order which is more or less chronological: 1: periodic elections; 2: genuine elections; 3: stand for election; 4: universal suffrage; 5: voting in elections on the basis of the right to vote; 6: equal suffrage; 7: secret vote; 8: free expression of the will of the voters (see Table 1, below). As a consequence, this attribution of a continuous character to the right to participate through elections would strongly underline the fact that the simple act of voting on the day of the elections does not exhaust elections or consume this part of participation. Instead, the continuous character of elections implies that elections are an ongoing process of a cyclical nature: when one election has been completed and those elected have assumed their seats, the process will start again from the beginning. In addition, each turn of the cycle should result in a re-evaluation of the performance of a country as concerns elections so that the next cycle would implement the necessary corrections. In this way, the subsequent electoral cycles should display an ever better realization of the right to participation and the human rights in general.

At the same time as Article 25 of the CCPR, through its legally binding nature, gives a justification and a standard for international election observation (and probably for national election observation, too), a cyclical understanding about the process of elections in a state has implications, for instance, for the organization of the national elections and for the work of the various election observers. For the election observers, a cyclical understanding of the process of elections is a pointer to the direction that a short-time observation is clearly not enough; the main thrust of election observation must be of a long-term nature.

The extension of elections far beyond the immediate act of voting on the election day also has wider implications, because it results in a need to take into account a number of other human rights closely linked with the right to participation. The so-called political rights of freedom of association, freedom of assembly and freedom of speech are brought into the election context in a more substantive manner under this cyclical understanding of elections.

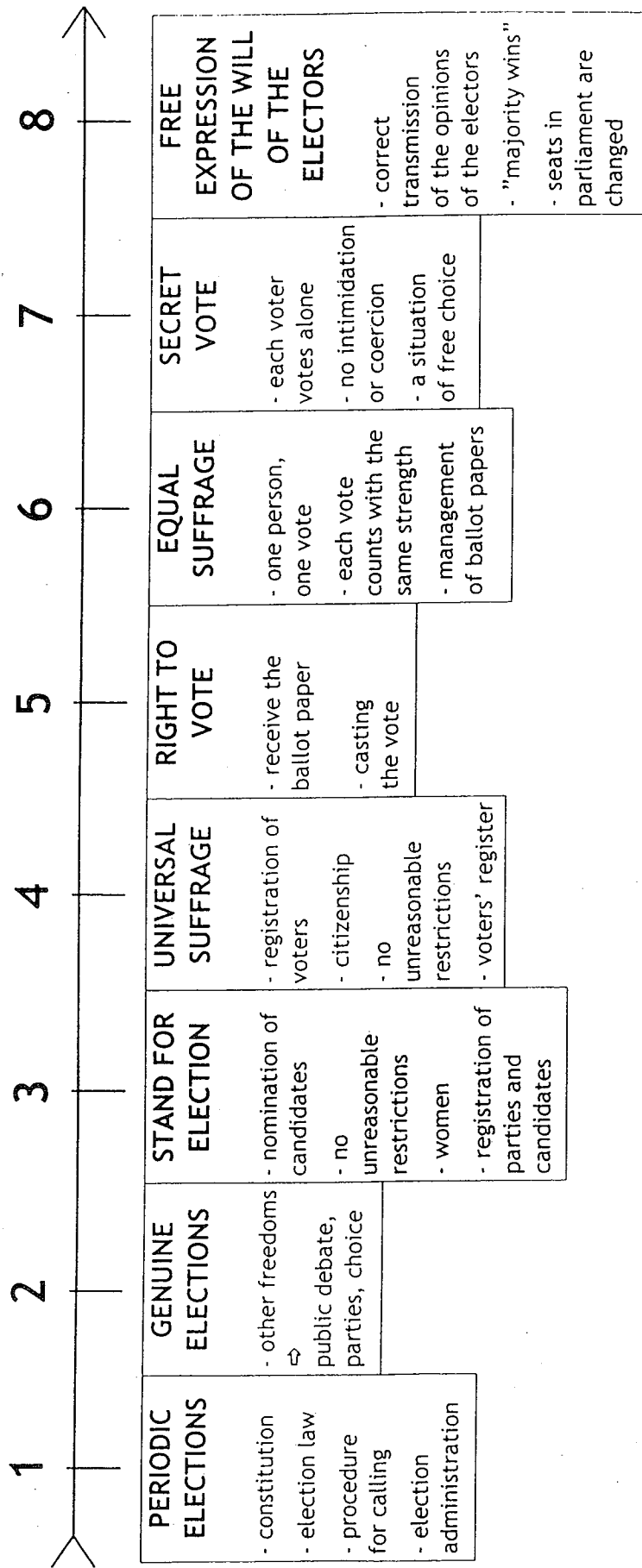


Table 1. The Phases of Elections

In this article, we will explore the various election elements found in Article 25 of the United Nations Covenant on Civil and Political Rights. The issues are hence the following: what are the contents of the election elements in Article 25 of the CCPR? What do these elements imply as a more practical matter at the level of national implementation and also at the level of international election observation? In addition, we will consider similar election-related features and their interpretation from some other human rights conventions, *inter alia*, the principles expressed in the Universal Declaration of Human Rights (UDHR), with Article 21 as the point of departure, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) as well as the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights; ECHR) and the principles and political commitments developed within the Organization for Security and Co-operation in Europe (OSCE), especially in its Document of the Copenhagen Meeting of the Conference on the Human Dimension of the at that time Conference on Security and Co-operation in Europe (CSCE) of 1990. The explicit norms concerning participation are, however, not functional without the adjacent political rights, *inter alia*, the freedom of speech and of the press, the freedom of association and the freedom of assembly.<sup>3</sup> The intention is to analyse the legal framework created by these norms on political participation and to link them up with practice in the area as expressed by relevant election legislation in a number of countries. Hence the focus is partly global, but also to some extent more specifically European. Local government elections and sub-national or regional elections are only occasionally mentioned as specific categories of participation.

## 2. PERIODIC ELECTIONS

The element of periodic elections contains actually two distinct aspects: 1) that there must be elections, and 2) that the elections which take place in a country are organized with certain intervals. From this perspective, the element of periodic elections actually starts the electoral cycle.

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<sup>3</sup> Paragraphs 12, 25 and 26 of the General Comment on Article 25 by the UN Human Rights Committee (*loc. cit.*, note 2) mention these rights in a manner which could be understood as a definition of political rights. The list of adjacent rights provided by A. Rosas, 1999, p. 431, contains a larger number of human rights included in the UDHR. See below, footnote 18.

On the first aspect, it is important to recognize that the formulation of public powers is carried out in a law. Therefore, although Article 25 does not specifically identify legislatures as bodies that should be elected, at least the law-making bodies should be elected in a manner which conforms with Article 25. In addition, there may exist other publicly elected bodies that have decision-making authority, and also their exercise of public powers should be based on a legitimacy which derives from elections. In logical terms, elections precede the turnover of politics and policies into laws and practical application: in elections, those ruled exercise their political rights to express their preferences concerning those ruling. Therefore, elections could be said to precede the other substantive areas of human rights in the turnover of human rights norms into national rules and decisions.<sup>4</sup> Such elections, especially elections to the legislature, should be created at the level of national law, and normally one would expect that the constitution of a country would contain at least the basic features of an electoral system. The more detailed provisions on elections are established in a distinct election law, which may cover all elections organized in a country, or in separate election laws for the various elections held in a country, such as parliamentary elections, regional elections, and local government elections. Participation through freely chosen representatives is exercised by means of voting processes 'which must be established by laws that are in accordance with paragraph (b)' in Article 25.<sup>5</sup> Article 3 of Protocol No. 1 to the ECHR is perhaps most explicit in this institutional respect by stipulating the free expression of the opinion of the people in the choice of the legislature.<sup>6</sup>

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<sup>4</sup> See, e.g., General Assembly resolution 43/157 (8 December 1988), on enhancing the effect of the principle of periodic and genuine elections, para. 2: '[P]eriodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and . . . , as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, including political, economic, social and cultural rights'. This should not, however, be interpreted so that a hierarchy between different human rights is created.

<sup>5</sup> Paragraph 7 of the General Comment on Article 25 by the UN Human Rights Committee (*loc. cit.*, note 2). For instance, in dealing with the second periodic report under the CCPR of the Republic of Guyana (UN doc. CCPR/C/SR.1806, at para. 23), the issue arose that the members of Parliament in Guyana were not elected but designated by the heads of the political parties after the election of the President and that the members of Parliament were not answerable to the voters for their acts. The Chairperson of the Human Rights Committee then noted that such practices ran counter to the provisions of Article 25 of the CCPR.

<sup>6</sup> In judging the compliance with Article 3 of Protocol No. 1 under the wide margin of appreciation, the European Court of Human Rights must satisfy itself that conditions established by the states for participation do not 'thwart the free expression of the opinion of

In the *Greek* case, the European Commission of Human Rights concluded that in the absence of an electoral law for the choice of a legislature more than two years after the military coup in Greece, the Greek people were prevented from expressing their political opinions by choosing a legislature in accordance with Article 3 of Protocol No. 1.<sup>7</sup> The provision in the ECHR is limited to law-making bodies and it leaves out all other fora for decision-making in the sphere of public administration.

In addition, it is recognized that the norms of international law rarely contain explicit requirements concerning the national administrative structures that are supposed to be in charge of the implementation of human rights. This is also true concerning elections: Article 25 of the CCPR does not explicitly require the creation of an election administration in a state. Nonetheless, because citizens have the right to participate either directly or through freely chosen representatives, they in fact have a right to have access to the mechanisms that are included in the electoral process, especially a right to access to a polling station in which the individual voter is supposed to cast his or her vote, either in referendums or in elections to representative decision-making fora. This is also the opinion of the UN Human Rights Committee, which in its General Comment on Article 25 states that '[a]n independent electoral authority should be established to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant'.<sup>8</sup> More or less the same is the message of Article 25(a), although it is not merely a right, but there must also be an opportunity to participate, which may be interpreted as an

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the people in the choice of the legislature'. See *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, *Publications of the European Court of Human Rights*, Series A, Vol. 113, para. 52. In the same judgment, the Court concluded that the term 'legislature' does not necessarily mean only the national parliament, but could, in the light of the constitutional structure of the state in question, also encompass sub-state legislatures. However, councils with merely administrative powers are not legislatures in the meaning of Article 3. See Application No. 11391/85, *Booth-Clibborn v. the United Kingdom*, European Commission of Human Rights, decision of 5 July 1985 on the admissibility of the application, *Decisions and Reports*, Vol. 43 (1985), pp. 236-249.

<sup>7</sup> *Yearbook of the European Convention on Human Rights: The Greek Case*, Vol. 12 (1969), para. 416. The Committee of Ministers of the Council of Europe agreed with the findings of the European Commission of Human Rights. See Resolution DH (70)1 of 15 April 1970, para. 12.

<sup>8</sup> Paragraph 20 of the General Comment to Article 25 (*loc. cit.*, note 2).

indication of a more active duty of the state to promote the opportunity to participate and make the electoral process accessible.<sup>9</sup>

Therefore, in respect of the exercise of the rights of participation, it is assumed that a national election administration of some sort exists to implement the principles and rules concerning elections: because elections are required by human rights norms, it seems inevitable that a certain administrative and normative system must necessarily exist at the national level to arrange elections. For instance, Article 3 of Protocol No. 1 to the ECHR starts off by saying that '[t]he High Contracting Parties undertake to hold free elections' when choosing the legislature, which means that elections must be organized by the state, which in turn would seem to necessitate the existence of an administrative structure of some sort to carry out the practical tasks related to the elections. In the case of *Mathieu-Mohin and Clerfayt v. Belgium*,<sup>10</sup> the European Court of Human Rights explains that the primary obligation in Article 3 of Protocol No. 1 to the ECHR is not that of 'abstention or non-interference, as with the majority of the civil and political rights, but one of adoption by the State of positive measures to "hold" democratic elections'. This is also supported by paragraph 2 of the OSCE Copenhagen Document, which says that the rule of law means, *inter alia*, justice 'guaranteed by institutions providing a framework for its fullest expression'. These institutions of the national election administration should be of a more permanent character so that experience in how to organize elections is accumulated. Temporary institutions or institutions with a short life-span should be avoided also for the reason that more permanent institutions may be able to maintain a higher level of integrity and independence from the sometimes whimsical operation of day-to-day politics.

Because Article 25 contains the requirement that elections must be held and organized with certain intervals, there is at least an implicit understanding in Article 25 that the elections prescribed there would have to be organized by a more permanent institution or structure that is created by the State Party to the CCPR. The creation of an election administration would, from this perspective, be a duty of the state, and provisions concerning such an election

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<sup>9</sup> According to the opinion of the UN Human Rights Committee in the case of *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, 'opportunity' under Article 25 of the CCPR means a *de facto* possibility of exercising the right to take part in the conduct of public affairs without any of the distinctions mentioned in Article 2 of the CCPR and without unreasonable restrictions. Communication No. 35/1978, views adopted on 9 April 1981, *Human Rights Committee: Selected Decisions under the Optional Protocol* (New York: United Nations, 1985), pp. 67-71. However, the Human Rights Committee found no violation of Article 25 of the CCPR in this case.

<sup>10</sup> *Loc. cit.*, note 6, at para. 50.

administration would probably be included in the election law that regulates elections.

However, even in cases where elections are organized, those ruling could try to steal the elections by using the election administration for their purposes. For this reason the accountability of the election administration is at least as important as the accountability of those ruling. Accountability of the election administration can be achieved by different means. The main options are independence and involvement and a mix of the two. The purpose of such an election administration is to supervise the electoral process and to ensure that it is conducted fairly, impartially and in accordance with established laws that are compatible with the requirements of international law.<sup>11</sup> In this context, Article 25(c) mentions the right to equal access to public service in his country. This would seem to mean, in the area of the electoral process, that the positions in the election administration, whether filled with civil servants or with civic representatives of the parties, should not be reserved to any specific segment of the society with its own vested interests in the elections, but should be open, on general terms of equality, to all persons who fulfil a set of common qualifications. This should not, however, mean that the widespread practice of including in electoral commissions representatives of parties to ensure impartiality is prohibited.

The option of independent election administration contains the appointment of independent election administrators who are known for their impartiality and integrity and who are supposed to give effect to a great degree of independence in the performance of their duties. Through the requirement of independence, the election administration and the persons involved in the administration of elections are in one way or another isolated from those who stand as candidates in elections and from those who are eventually elected. If the foundation of their independence is called into question, for instance, in individual cases, they lose their credibility and can be called into account for their improper conduct in office.<sup>12</sup> The option of involvement (or inclusiveness,

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<sup>11</sup> See paragraph 20 of the General Comment on Article 25 (*loc. cit.*, note 2).

<sup>12</sup> See, e.g., Case No. 98-GE-146 of 25 September 1998 by the Election Appeals Sub-Commission (EASC) of the OSCE Mission to Bosnia and Herzegovina in the matter of one hundred fifty prisoners at the Srbinje Prison who were denied the right to vote in the 1998 General Elections. The Bosnian EASC found that a president of a Local Election Commission had, through her inactivity, more or less wantonly denied the 150 inmates their right to vote. According to the decision of the EASC, the pay of the president of the Local Election Commission was withheld for the remainder of 1998, and in addition the EASC ordered that she would not be reinstated or placed in any other election related position under the authority of the Provisional Election Commission. See <http://www.oscebih.org/easc/eng/easc.htm>.

as the case may be) draws on the self-interest of the parties and candidates to be represented in the election administration on an equal basis as the main operators. The effect of such involvement is that a mechanism of checks is introduced between the different participants in the election administration so that any misconduct is prevented and, if taking place, immediately disclosed to the public-at-large. The two options can also be mixed so that some of the election administrators are independent officials, while a portion of them are representatives of the parties or candidates involved in the election.

The purpose of accountability is, on the one hand, to seal off the election administration from the influence of the government of the day and, on the other, in keeping with paragraph 5.4 of the Copenhagen Document of the OSCE,<sup>13</sup> to make sure that none of the participating states can use the election administration to promote its own interests in a way that would call the legitimacy of the elections into question. Accountability is in this context also related to the rule of law, especially if the latter is understood as the independent interpretation of the law.<sup>14</sup> Hence by paraphrasing a famous sentence from the area of the independent and impartial judiciary, 'electoral justice in the choice of the decision-makers must be seen to be done' at least according to the main principles of political participation, which are genuine elections, periodic elections, universal suffrage, equal suffrage and the secrecy of the vote as well as the right to stand as a candidate.

On the second aspect of this election element, the intervals between elections, the element of periodic elections seems to imply that the national election law and, at least concerning the elections to the legislature, the constitution of a country, will establish the intervals between which elections are to be held. In fact, the European Commission of Human Rights concluded in the *Greek* case that Article 3 of Protocol No. 1 presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society.<sup>15</sup> The periodicity of elections is important, because those ruling should not be able to perpetuate their government. The moments at which the free expression of the will of the electors is heard should be defined as clearly as possible. To this end, elections must be held by certain reasonable intervals which according to the interpretation of the UN Human Rights Committee shall not be unduly long and which ensure that the authority of

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<sup>13</sup> 'a clear separation between the State and political parties; in particular, political parties will not be merged with the State;'

<sup>14</sup> See paragraph 5.5 of the Copenhagen Document of the OSCE: 'the activity of the government and the administration as well as that of the judiciary will be exercised in accordance with the system established by law'.

<sup>15</sup> *Op. cit.*, note 7, para. 416.



government continues to be based on the free expression of the will of the electors.<sup>16</sup>

For instance, to fix the period at 25 years, that is, a generation, is clearly too long a time, because the will of the electors is highly likely to change over the course of the years. In a modern society with instant media coverage, it would probably be highly problematic even to fix the period at ten years. However, judging on the basis of the constitutions of the world, a period between four and six years seems normal, where the shorter period is preferable for legislative office at which the norms are actually formulated, while the longer period seems to be generally acceptable for executive office. A rationale for a distinction between the periods of the legislative office and executive office may be offered by the doctrine of the separation of powers: by prescribing a longer period of office for the head of the executive, it may be easier at the level of the national constitution to keep the two power-houses apart and prevent an inappropriate unification of the powers.

Shorter terms of office for the legislature (or the executive, for that matter) are possible, too, but the use of very short periods between elections should be balanced with the stability of the government. The requirement of periodic elections should probably be interpreted so that the maximum period of office is fixed in the law, but this should not prevent the possibility of extraordinary elections if the political circumstances require such to take place.

The element of periodic elections should also be read so as to contain a requirement that the national law establishes procedures for how the elections for the following period are called. This would probably mean that a public body, such as the parliament or a national election committee, makes a decision on the matter and that the decision together with the date of the upcoming elections and information of other important election-related deadlines are communicated to the citizens. Such additional information would contain, for example, the date for the commencement of the nomination of candidates and the date for the closing of the list of candidates. The national election legislation may be designed so that this additional information is available by implication upon the decision concerning the date of the elections.

### 3. GENUINE ELECTIONS

The element of genuine elections is somewhat unclear at the same time as it is very interesting. Its contents are probably closely related to those of 'free and fair elections', which is a later concept from the area of the OSCE commitments.

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<sup>16</sup> See paragraph 9 of the General Comment on Article 25 (*loc. cit.*, note 2).

The element of genuine elections may, with a view to the fact that a number of the election elements are more specific (periodic elections, secrecy of the vote, equality of the vote, universality of the vote), be regarded as an element which tries to describe the environment in which elections should take place. This idea is present, for instance, already in one of the first UN resolutions on enhancing the principle of periodic and genuine elections of 1989. In this resolution the General Assembly declares that 'determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others within the constitution and national legislation'.<sup>17</sup> From this environment perspective, 'genuine elections' could be interpreted as consisting of at least two different meanings, a broader meaning and a narrower meaning. The adjective 'genuine' can, in its broader meaning, be interpreted so that the term 'genuine' brings in the other political rights into the area of participation. Hence the term 'genuine' would incorporate the provisions in the CCPR concerning at least the freedom of thought, speech, the press, assembly and association in the exercise of the right to participation.<sup>18</sup> However, the term 'genuine' can also have a more specific or narrow interpretation which nevertheless requires the incorporation of the other political rights, namely the interpretation that the term 'genuine' is a reference to the free choice between the candidates and the parties that the voter has to make when he or she expresses his or her will in the secrecy of the polling booth.

In fact, the narrower meaning of genuine elections, that is, the choice in the polling booth, can only function in a satisfactory way if the broader meaning of genuine elections, the adjacent political rights, is realized in a proper way. In addition, the term 'genuine' would thus introduce an element of competitiveness in the electoral process by letting the various candidates and parties use their adjacent political rights in playing against each other in the marketplace of political ideas through promises, arguments and counter-arguments in an

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<sup>17</sup> General Assembly resolution 44/146 (15 December 1989).

<sup>18</sup> See also A. Rosas, 1999, p. 431. Without reference to the term 'genuine', Rosas envisions an even broader framework in the UDHR, including the principle of equality (Articles 1, 2, 4 and 7), civil rights and liberties, notably liberty and security of the person (e.g., Articles 3, 5 and 9) and the freedom of movement, expression, assembly and association (Articles 13, 19 and 20) as well as a minimum of social and economic rights (Articles 22 through 26 of the UDHR). Rosas mentions (at p. 439) that there was nothing near a consensus for requiring a multiparty system during the drafting of the UDHR. On the incorporation of the freedom of association in the competitive political setting, see paragraph 7.6 of the Copenhagen Document of the OSCE. See also paragraphs 8 and 12 of the General Comment on Article 25 by the UN Human Rights Committee (*loc. cit.*, note 2).

attempt to persuade the voter to cast his or her vote for a particular candidate or party.<sup>19</sup>

It is, in this context, interesting to look back to the 1950s, to a time when the Cold War was raging and at least two competing understandings and interpretations of political participation, the Western and the Socialist, were struggling against each other. In what could be seen as an attempt to give an interpretation to Article 21 of the UDHR in connection with the non-self-governing territories under the Charter of the United Nations, the General Assembly of the United Nations adopted in a resolution a set of factors indicative of the attainment of independence or of other separate systems of self-government.<sup>20</sup> These factors seemed to fix the internal constitutional conditions to '[u]niversal and equal suffrage, and free periodic elections, characterized by an absence of undue influence over and coercion of the voter or of the imposition of disabilities on particular political parties'. A checklist for the fulfilment of these conditions included the following elements:

- (a) The existence of effective measures to ensure the democratic expression of the will of the people;
- (b) The existence of more than one political party in the Territory;
- (c) The existence of a secret ballot;
- (d) The existence of legal prohibitions on the exercise of undemocratic practices in the course of elections;
- (e) The existence for the individual elector of a choice between candidates of differing political parties;
- (f) The absence of 'martial law' and similar measures at election times;
- (g) Freedom of each individual to express his political opinions, to support or oppose any political party or cause, and to criticize the government of the day.

The factors and this checklist contain much of what can be said about elections, but it is interesting to note that a political system created along these lines is bound to be competitive. However, letter (g) of the checklist is of particular interest, because it summarizes the political rights that an individual must possess, such as the freedom of expression and the freedom of assembly, and concludes these rights by the most important outcome of them, the right to criticize the government of the day. This, in essence, is the right to opposition, which, again, is at the core of a competitive political system. It should be recalled, however, that this resolution was adopted by the General Assembly

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<sup>19</sup> On the discussions during the drafting of the UDHR in this respect, see A. Rosas, 1999, pp. 435 f. and 449.

<sup>20</sup> General Assembly resolution 742(VIII) (27 November 1953).

of the United Nations towards the end of the Korean War when, for instance, China and the Soviet Union were weak in the work of the United Nations.

The interpretation of Article 25(b) of the CCPR by the UN Human Rights Committee in 1996 falls well in this line of thinking:

Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.<sup>21</sup>

The two meanings of genuine elections, the broader and the narrower meaning, seem to be at the core of the current interpretation of Article 25 of the CCPR. At the same time, it is important to recognize that the broader and the narrower meanings are intertwined, and the narrower meaning cannot be realized if the broader meaning of genuine elections is defunct.

The freedom of choice is also reflected in the OSCE principles adopted after the era of the Cold War through the Copenhagen Document, which in paragraph 3 declares that the participating states recognize the importance of pluralism with regard to political organizations. The same idea is present in paragraph 9.3, which refers to the exclusion of any prior control—supposedly by governmental authorities—of the exercise of the freedom of association, albeit partly in a trade union context.

Something of this is embedded in Article 3 of Protocol No. 1 to the ECHR: the reference to *free* elections under conditions that will ensure the *free* expression of the opinion of the people in the *choice* of the legislature is certainly possible to interpret in a most competitive direction. All other rights and freedoms guaranteed by the Convention taken for granted, the freedom of choice actually implied by Article 3 is bound to lead to a competitive multiparty setting. This was actually the purpose behind it when it was approved, because the States Members of the Council of Europe were

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<sup>21</sup> Paragraph 19 of the General Comment on Article 25 (*loc. cit.*, note 2). See also paragraphs 25 and 26 of the General Comment. In the concluding observations on the initial report by Kyrgyzstan (UN doc. CCPR/CO/69/KGZ, 24 July 2000, para. 21), the UN Human Rights Committee expressed concerns about the National Communications Agency of Kyrgyzstan, which is attached to the Ministry of Justice in that country and which has wholly discretionary power to grant or deny licenses to radio and television broadcasters: 'Delay in the granting of licenses and the denial of licenses have a negative impact on the exercise of freedom of expression and the press guaranteed under article 19 and result in serious limitations in the exercise of political rights prescribed in article 25, in particular with regard to fair elections'.

interested in ruling out not only totalitarian dictatorship of the kind that had existed before and during the Second World War, but also one-party states of the Soviet or East European kind. A clear and persistent breach of Article 3 of Protocol No. 1 was found in the *Greek* case because political parties were prohibited and the domestic legislative situation such that they could not be reorganized and their charters formally adopted.<sup>22</sup> Here the freedom of political association was curtailed in violation of the ECHR.

For the individual elector, Article 19 of the CCPR and Article 10 of the ECHR are of great importance: the electors cannot formulate any will that they could express at elections—or referendums, as the case may be—unless they have access to information and are free to discuss the political matters that are of relevance in the elections either between themselves or through the media or at the assemblies and associations created according to the other human rights norms attached to political participation. In fact, the elections could not be genuine in the meaning of Article 25 or free in the meaning of Article 3 of Protocol No. 1 to the ECHR without voters having information about the incumbents and their performance in office and about those who challenge their seats: the voters are unable to make informed choices between the candidates unless Article 19 and Articles 9, 10 and 11 of the ECHR are operative and effective. It is essential in this respect that campaigning is free from interference from the public authorities<sup>23</sup> and that access to media exists.<sup>24</sup>

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<sup>22</sup> *Op. cit.*, note 7, para. 417. The Committee of Ministers of the Council of Europe agreed with the findings of the European Commission of Human Rights. See Resolution DH (70)1 of 15 April 1970, para. 12.

<sup>23</sup> Paragraph 7.7 of the Copenhagen Document of the OSCE is most illustrative of this point: the participating states will 'ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution'. The freedom of expression, as also the other relevant political freedoms, are of course continuous rights that should exist to the fullest possible extent also between the elections, not only during the election day.

<sup>24</sup> The states participating in the OSCE process have, in paragraph 7.8, agreed to 'provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process'. From a Bosnian context, the biased reporting of Radio St. John is a good example: it was found by the Election Appeals Sub-Commission of Bosnia to be not in compliance with the relevant rules and regulations on the media, whereupon the radio station was charged by the EASC with the duty to broadcast a statement prepared by the EASC. With continued non-compliance with the order, one candidate of the SDS Party would be struck for each day the service announcements were not delivered. See Case No. 98-GE-81 of the Election Appeals Sub-Commission of the OSCE Mission to Bosnia and

The problem seems to be, however, the connection to the openness of the institutions and the extent to which, for instance, publicity of documents and sessions of public bodies can be justified and demanded. For instance, Article 10 of the ECHR is not interpreted so as to grant a right to information or to documents that are in the possession of government agencies, although the public has a right to receive such information and ideas that are in the possession of the press.<sup>25</sup> For a comparison, trials before courts should in general be public according to Article 10 of the UDHR and Article 14(1) of the CCPR as well as Article 6(1) of the ECHR.

According to Article 19 in the CCPR and Article 10(1) of the ECHR, everyone has or shall have the right to freedom of opinion and of expression. These articles contain the interesting specification that this right includes the freedom to seek, receive and impart information and ideas through any media and regardless of frontiers.<sup>26</sup> Because the purpose of the electoral process is to affect the formulation of the laws of the state or the most important decisions of general application made by the elected public authorities, at least the procedure through which the main rules of general application are produced should be public. This is also the position of paragraph 5.8 of the Copenhagen Document of the OSCE: 'legislation, adopted at the end of a public procedure, and regulations will be published, that being the condition for their applicability. Those texts will be accessible to everyone'.

Hence the publicity of parliamentary proceedings is normally provided, but the question is how far this parliamentary openness should extend itself. In many countries, the sessions of the full parliament are open for the public and the media, while the deliberations in the parliamentary committees may be closed. Given the publicity of the general sessions in the parliament, it should be even clearer that the electoral process that takes place between the

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Herzegovina, at <http://www.oscebih.org/easc/eng/easc.htm>.

<sup>25</sup> See *The Observer and the Guardian v. the United Kingdom*, judgment of 26 November 1991, *Publications of the European Court of Human Rights*, Series A, Vol. 216, para. 59 (b), and *Thorgeir Thorgeirson v. Iceland*, judgment of 25 June 1992, *Publications of the European Court of Human Rights*, Series A, Vol. 239, para. 63. In the case of *Guerra and Others v. Italy*, the European Court of Human Rights concluded that the freedom to receive information in Article 10(2) of the ECHR cannot be construed as imposing on a state, in circumstances such as those in the *Guerra* case, positive obligations to collect and disseminate information of its own motion. Judgment of 19 February 1998, *Reports of Judgments and Decisions 1998-I*, No. 64, pp. 210-249, at para. 53.

<sup>26</sup> Paragraph 12 of the General Comment on Article 25 by the UN Human Rights Committee (*loc. cit.*, note 2) considers the freedom of expression, assembly and association as essential conditions for the effective exercise of the right to vote and mandates their full protection.

individual voter and the activities of the law-makers in the parliament should be transparent and open. If this is not the case, the will of the voters may be distorted or the legitimacy of the process damaged in other ways.

This means that all those with the right to vote should be able to make a genuine and well-informed choice not only between different candidates but—with a reference to the likely outcome of the freedom of association in the human rights norms involved in this review—between candidates of different parties so that the making of this choice is supported by the casting of the vote in secret with the knowledge that their votes will be of equal value in determining the outcome of the election.

#### 4. THE RIGHT TO STAND FOR ELECTIONS

There is a reference in Article 25(b) to the right to be elected. This does not mean that the citizens would have a subjective right to become members of an elected body, but rather that all citizens that qualify under the provisions of the law should have not only the right but also the opportunity to stand as a candidate. Article 25 is clear on this point and elaborates on the right and the opportunity to be elected, that is, on the conditions under which it is possible for a voter to stand as a candidate in elections. This is important against the background of the electoral cycle: those elections where the right to vote is exercised often commence for the voters with the nomination of candidates.

The election element on the right to be elected could be developed beyond the ordinary concerns related to the nomination of candidates so as to target a number of special groups that may be at a disadvantage in the exercise of their rights in general and their political rights in particular. In Article 5(c) of the CERD, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee to everyone without any distinction the enjoyment of political rights, in particular the right to participate in elections through voting and through the opportunity to stand for election on the basis of universal and equal suffrage.<sup>27</sup> Article 7(a) of the CEDAW promotes inclusiveness for women by prescribing eligibility for

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<sup>27</sup> It is in this respect interesting to point out that General Recommendation No. 21 of the Committee on the Elimination of Racial Discrimination (Report of the Committee on the Elimination of Racial Discrimination, UN doc. A/51/18, pp. 125–126) distinguishes between internal and external self-determination of peoples and holds that there exists a link between internal self-determination and the right of every citizen to take part in the conduct of public affairs at any level, as referred to in Article 5(c) of the CERD. In its General Comment on Article 25, para. 2, of the CCPR, the UN Human Rights Committee makes a somewhat similar connection between Article 1 and Article 25 of the CCPR (*loc. cit.*, note 2).

election to all publicly elected bodies, but extends inclusiveness in paragraphs (b) and (c) to the practical functioning in elective office and to participation in non-governmental organizations and associations concerned with the public and political life of the country so as to remind us of Article 20 in the UDHR and Article 22 in the CCPR. Eligibility on equal terms is also explicitly at the core of Article 5(c) of the CERD.

The CEDAW and the CERD, together with the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, in which the right of effective participation of minorities is mentioned,<sup>28</sup> is a pointer in the direction that there are certain disadvantaged groups in the society which may need some special attention in terms of participation. It does not help much if these groups have the equal right to vote if the candidates nominated for election contain nobody from these groups. Therefore, it might be possible to promote the participation of these groups already at the nominations stage, for instance, by informing these groups of the necessity to avail themselves of the legal mechanisms to nominate candidates.<sup>29</sup>

Article 3 of Protocol No. 1 to the ECHR has, too, been interpreted so as to create a subjective right to stand for election to the legislature.<sup>30</sup> In fact, the European Court of Human Rights has concluded that the original idea of an institutional right (or duty, as the case may have been) to the holding of free elections has eventually and through the concept of universal suffrage developed into a concept of subjective rights of participation, that is, into a right to vote and a right to stand for election to the legislature.<sup>31</sup> This right to stand for election to the legislature could then mean that, for instance, the nomination of candidates should not be left solely to the political parties, but

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<sup>28</sup> General Assembly resolution 47/135 (18 December 1992). Effective participation is also one of the themes of Article 15 of the Council of Europe Framework Convention for the Protection of National Minorities, adopted in 1994.

<sup>29</sup> On this, see also the 2001 OSCE/ODIHR Guidelines to Assist National Minority Participation in the Electoral Process, at <http://www.osce.org/odihr/docs/guidelines/>

<sup>30</sup> *Mathieu-Mohin and Clerfayt v. Belgium* (*loc. cit.*, note 6), para. 51. In the case of *Gitonas and Others v. Greece*, the European Court of Human Rights concluded that the states have a broad margin of appreciation to establish in their constitutional order rules governing, e.g., criteria for disqualification, whereby it sustained the Greek disqualification of the holders of certain high-ranking public or semi-public offices. Judgment of 1 July 1997, *Reports of Judgments and Decisions* 1997-IV, No. 42, pp. 1217-1265, at para. 19.

<sup>31</sup> *Mathieu-Mohin and Clerfayt v. Belgium* (*loc. cit.*, note 6), para. 51. In the case of *Gitonas and Others v. Greece* (*loc. cit.*, note 30), para. 39, the Court reiterated that 'Article 3 of Protocol No. 1 implies subjective rights to vote and to stand for election'. This was also reiterated in the case of *Labita v. Italy* (Application No. 26772/95), European Court of Human Rights, judgment of 6 April 2000, para. 201.



that there should exist a mechanism through which also those with the right to vote could, under certain conditions and without the interference of the political parties (or the state, for that matter), nominate independent candidates.<sup>32</sup>

This is exemplified, for example, by the decision of the UN Human Rights Committee in the case of *Peter Chiiko Bwalya v. Zambia*. The complainant, a leading figure of a political party in opposition to the former President, had been prevented from participating in a general election campaign as well as from preparing his candidacy for this party. The Committee observed that:

This amounts to an unreasonable restriction on the author's right to 'take part in the conduct of public affairs' which the State party has failed to explain or justify. In particular, it has failed to explain the requisite conditions for participation in the elections. Accordingly, it must be assumed that Mr. Bwalya was detained and denied the right to run for a parliamentary seat in the Constituency of Chifubu merely on account of his membership in a political party other than that officially recognized; in this context, the Committee observes that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.<sup>33</sup>

Hence a system that in fact prevents the candidacy and campaigning of a person not belonging to the only recognized party would then seem to constitute a violation of Article 25. The Human Rights Committee found an unreasonable restriction to exist also in the case of *Alba Pietraroia v. Uruguay*,<sup>34</sup> because the complainant had been barred from taking part in the conduct of public affairs and from being elected for 15 years in accordance with an Act that created such a general punishment.

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<sup>32</sup> This is addressed in paragraph 7.5 of the Copenhagen Document of the OSCE: the participating states will 'respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination'.

<sup>33</sup> Communication No. 314/1988, *Peter Chiiko Bwalya v. Zambia*, views adopted on 14 July 1993, Report of the Human Rights Committee, Vol. II, UN doc. A/48/40, pp. 52-56, at para. 6.6.

<sup>34</sup> Communication No. 44/1979, views adopted on 27 March 1981, *Human Rights Committee: Selected Decisions under the Optional Protocol* (New York: United Nations, 1985), pp. 76-80. In the case, the point was also made that the principle of proportionality would require that a measure as harsh as the deprivation of all political rights for a period of 15 years be specifically justified. However, no such justification had been made in the case. A number of other cases involving Uruguay during the state of emergency has been decided by the UN Human Rights Committee, and in so far they deal with Article 25 of the CCPR, the result has been more or less the same, with slight variations depending on the individual case.

In fact, according to the interpretation of the UN Human Rights Committee, the 'effective implementation of the right and the opportunity to stand for elective office ensures that persons entitled to vote have a free choice of candidates'. Combined with the principle that candidates cannot be required to be members of parties or of specific parties or to hold some defined political opinion, the scene is opened up for a competitive election.<sup>35</sup>

As a practical matter, the element of standing for election should imply that the national law contains sufficient provisions concerning the registration of parties and candidates so that all political opinions and groupings have an equal opportunity, without any of the distinctions mentioned in Article 2 of the CCPR and without unreasonable restrictions, to officially become participants in the electoral process which leads up to election. Such registration procedures should hence not be so difficult that candidacy is inhibited (for example, extremely high number of supporters required for candidacy or an excessive deposit required from a party before a list of candidates is accepted for elections).<sup>36</sup> In the case of *Antonina Ignatane v. Latvia*,<sup>37</sup> the Human Rights Committee identified language as one possible distinction of such nature, at least if it is used in an arbitrary manner. In the case, the applicant had first been granted a certificate of command of the Latvian language, which as such could be required under national law. The certificate had been issued by a panel of five experts. However, a few days before the election, one single inspector had made the determination that the applicant's command of the Latvian language was not sufficient, which had caused the Election Commission to strike the applicant from the list of candidates in municipal elections as ineligible. The Human Rights Committee held that the results of the review led to the situation that the applicant was prevented from exercising her right to participate in public life in conformity with Article 25 of the Covenant. The

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<sup>35</sup> See paragraph 15 of the General Comment on Article 25 (*loc. cit.*, note 2). See also General Assembly resolution 43/157 (8 December 1988), on enhancing the effectiveness of the principle of periodic and genuine elections, para. 3: '[T]he will of the people requires an electoral process which accommodates distinct alternatives, and . . . this process should provide an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others'. See also the case of *Peter Chiiko Bwalya v. Zambia* from the UN Human Rights Committee referred to above.

<sup>36</sup> In its concluding observations on the initial report by Kyrgyzstan (*loc. cit.*, note 21, para. 23), the UN Human Rights Committee voiced concerns 'about the conduct of the parliamentary elections in the Kyrgyz Republic in March 2000 and in particular about the non-participation of political parties which failed to register one year prior to the elections, or the statutes of which did not explicitly declare an intention to stand for elections'.

<sup>37</sup> Communication No. 884/1999, views adopted on 25 July 2001, UN doc. CCPR/C/72/D/884/1999, paras. 7.4 and 7.5.

Committee concluded that the annulment of the applicant's candidacy 'pursuant to a review that was not based on objective criteria and which the State party has not demonstrated to be procedurally correct is not compatible with the State party's obligations under article 25 of the Covenant'. Therefore, she was considered to be a victim of a violation of Article 25, in conjunction with Article 2 of the CCPR.

The free expression of the will of the electors should not be unduly restricted, but instead promoted during this stage of the electoral cycle, which is crucial for the outcome of the elections. However, certain categories of persons may, under certain conditions, be excluded from the right to stand for elections. In the case of *Joszef Debreczeny v. the Netherlands*, it was alleged that the refusal to accept the credentials of an elected person for a seat of a local council because the person was a police sergeant in the national police force would amount to a violation of Article 25 of the CCPR. The UN Human Rights Committee noted that:

the restrictions on the right to be elected to a municipal council are regulated by law and that they are based on objective criteria, namely the electee's professional appointment by or subordination to the municipal authority. Noting the reasons invoked by the State party for these restrictions, in particular, to guarantee the democratic decision-making process by avoiding conflicts of interest, the Committee considers that the said restrictions are reasonable and compatible with the purpose of the law. In this context, the Committee observes that legal norms dealing with bias, for example section 52 of the Municipalities Act to which the author refers, are not apt to cover the problem of balancing interests on a general basis. The Committee observes that the author was, at the time of his election to the council of Dantumadeel, serving as a police officer in the national police force, based at Dantumadeel and as such for matters of public order subordinated to the mayor of Dantumadeel, who was himself accountable to the council for measures taken in that regard. In these circumstances, the Committee considers that a conflict of interests could indeed arise and that the application of the restrictions to the author does not constitute a violation of article 25 of the Covenant.<sup>38</sup>

## 5. UNIVERSAL SUFFRAGE

Article 25(b) of the CCPR puts special emphasis on inclusiveness by stipulating that elections shall be by universal suffrage. However, while the CCPR guarantees to everyone the right to the freedom of thought, opinion,

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<sup>38</sup> Communication No. 500/1992, *Joszef Debreczeny v. the Netherlands*, views adopted on 3 April 1995, Report of the Human Rights Committee, Vol. II, UN doc. A/50/40, pp. 59-65, at para. 9.3.

expression, assembly and association in Articles 18, 19, 21 and 22 in an inclusive way, subject only to some specified possibilities of restriction, the right to political participation is formulated in Article 25 so as to limit the right to vote to every citizen of the State Party to the CCPR so that a specific electorate can be formed with the help of some reasonable restrictions. This is also the position of paragraphs 6 and 7.3 of the Copenhagen Document of the OSCE. It is here possible to observe a wish to connect the exercise of one of the most fundamental political rights, the right to take part in the conduct of public affairs, which is directly related to the exercise of the sovereign decision-making powers of a state, to those individuals who can, along certain formal criteria, be identified as citizens of that state.

However, the reference to citizens in Article 25 of the CCPR can justify the exclusion of a substantial number of resident persons from the right to vote. This may have been the consequence of Article 25 especially in connection with the creation of new states in the aftermath of the collapse of greater ones during the 1990s and with the intensive migration and the creation of so-called new minorities that has taken place in Europe since the 1960s either because of economic or security reasons. In this respect, participation at the state level should be considered important because it could present a problem for the rule of law that a large proportion of the individuals expected to live under the laws of the state are not entitled to make an input in the formulation of those laws.<sup>39</sup> Much of the same applies to the ECHR, although Article 3 of Protocol No. 1 thereto does not specify that the people would coincide with the citizenry (this can be assumed, because the word 'everyone' is not used) and although Article 1 to the ECHR departs from a more inclusive concept of the individuals entitled to the rights and freedoms established in the Convention than the formal citizenry. There is, however, some case law from the area of Article 3 that indicates the recognition of the principle of universal suffrage and the related individual rights to vote and to stand for election, such as the case of *Mathieu-Mohin and Clerfayt v. Belgium*, which in fact refers to the equality of all *citizens* in this respect.<sup>40</sup> Also paragraph 7.3 of the Copenhagen Document of the OSCE departs from the universality and equality of suffrage.<sup>41</sup>

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<sup>39</sup> This aspect is also recognized in paragraph 3 of the General Comment on Article 25 by the UN Human Rights Committee (*loc. cit.*, note 2).

<sup>40</sup> *Loc. cit.*, note 6, para. 54. See also A. Rosas, 1999, p. 443 f.

<sup>41</sup> Concerning inclusiveness, see also Recommendation by the Nordic Council of 1975 to grant the right to vote and the right to stand for election at the local government level in one Nordic country to those citizens of the other Nordic countries who had been residents in the first country for at least two years. A similar mechanism is included in Article 19 of the Consolidated Version of the Treaty Establishing the European Community, according to

In this more restricted context, that is, concerning the citizenry, the principle of universal suffrage is subject only to certain reasonable restrictions, such as age. It is, according to the interpretation of the UN Human Rights Committee, unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should never be a condition of eligibility to vote, nor a ground for disqualification.<sup>42</sup>

This perspective is very much supported in Article 5 of the CERD with a view to the groups mentioned therein. The CERD provision continues by separating from this immediate accessibility through participation the right to take part in government as well as in the conduct of public affairs at any level and to have equal access to public service. Measures to promote accessibility are also recommended, for instance, in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, especially in Article 2 of the Declaration, which tries to enhance the effective participation of minorities.<sup>43</sup> The national election legislation should also contain provisions that facilitate the participation of handicapped persons in the electoral process as well as of those who are in detention or otherwise deprived of their freedom or who are in such a condition, for example, at hospitals that their ordinary participation in elections is difficult or impossible.<sup>44</sup>

The American Convention on Human Rights is very much repeating in its Article 23 the language of Article 25 of the CCPR, but with one difference: the American Convention adds a limitation clause on the basis of which the States Parties can, in national law, regulate the exercise of the rights and opportunities to participate in government on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a

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which citizens of Member States have the right to vote at the local government elections in the country they reside.

<sup>42</sup> See paragraph 10 of the General Comment on Article 25 (*loc. cit.*, note 2). The broader set of grounds for limitation of the right to political participation included in Article 23(2) of the 1969 American Convention on Human Rights may be understood as problematic against the background of the CCPR, because the American Convention also lists such grounds for limitation as language and education. See, *e.g.*, A. Rosas, 1999, p. 442 f.

<sup>43</sup> See *The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note* (The Hague: The Foundation on Inter-Ethnic Relations, 1999).

<sup>44</sup> See M. Nowak, 1989, p. 471, emphasizing the duty of the state to undertake positive measures to fulfil the 'opportunity' established in Article 25 of the CCPR, *e.g.*, by means of so-called mobile ballot commissions, early voting or some other method that fulfils the requirements of the Article.

competent court in criminal proceedings. Of these, at least language and education can be considered as problematic against the background of Article 25 of the CCPR.<sup>45</sup>

In practical terms and at the level of national election administration, universal suffrage means that all those entitled to vote should be entered on the list of voters and be guaranteed the opportunity to vote. The UN Human Rights Committee has emphasized that if a residency requirement applies to registration as a voter, such a requirement should not be imposed so as to exclude the homeless from the right to vote. Moreover, the Committee has pointed out that persons who are deprived of their liberty but who have not been convicted should not be excluded from the right to vote.<sup>46</sup>

In the European setting, two recent cases deal with the registration of voters. In the case of *Labita v. Italy*,<sup>47</sup> the applicant claimed that his exclusion from the list of voters for the reason that he allegedly was a member of the Mafia, which exclusion took place after his acquittal in court, was in contravention of Article 3 of Protocol No. 1 to the ECHR. The Court concluded that the states have a wide margin of appreciation in determining the conditions for the subjective rights to vote and to stand for election. In the present case, the Court had to make sure that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness, that they are imposed in pursuit of a legitimate aim, and that the means employed are not disproportionate. It established that the temporary suspension of voting rights of persons against whom there is evidence of Mafia membership pursues a legitimate aim. However, the removal of the name of the person from the list of voters was not based on any concrete evidence to which a 'suspicion' that the applicant belonged to the Mafia could be anchored. Hence the Court found a violation of Article 3 of Protocol No. 1 to the ECHR. In the case of *Matthews v. the United Kingdom*,<sup>48</sup> the European Court of Human Rights found a violation of Article 3 of Protocol No. 1 to the ECHR in a situation in which a British national resident in Gibraltar had been denied registration as a voter at the elections to the European Parliament. Because the

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<sup>45</sup> See, e.g., A. Rosas, 1999, p. 442 f.

<sup>46</sup> Paragraphs 11 and 14 of the General Comment on Article 25 (*loc. cit.*, note 2). In connection with the periodic report of the United Kingdom relating to Hong Kong before the hand-over to China, the Human Rights Committee expressed its concern that laws depriving convicted persons of their voting rights for periods of up to ten years may be a disproportionate restriction of the rights protected by Article 25. See Report of the Human Rights Committee, Vol. I, UN doc. A/51/40, at para. 65.

<sup>47</sup> *Loc. cit.*, note 31, paras. 198–203.

<sup>48</sup> Judgment of 18 February 1999, *Reports of Judgments and Decisions 1999-I*, pp. 251–304.

legal order of the European Community is directly applicable to the inhabitants of Gibraltar and because the EC Treaty guarantees the right to vote to the citizens of the Union, the Court found that the European Parliament is such a part of the 'legislature' for the residents of Gibraltar that they should be guaranteed by the United Kingdom the right to participate in the elections to the European Parliament. Nevertheless, according to the Court, the applicant had been completely denied any opportunity to express her opinion in the choice of the members of the European Parliament.

Universal suffrage should not, however, be interpreted too extensively, so that a person who is actually to be excluded on the basis of objective and reasonable grounds established by law is anyway entered on the list of voters.<sup>49</sup> Inclusiveness should, with reference to the equality of the vote, also be defined so as to not open up possibilities to be entered more than once on the list of voters. Hence the universal list of voters in a country should, in order not to violate the voters' expectations of an equal vote, be closed at a certain point before the elections after due regard for the opportunities of the individuals to check the list of voters, which promotes the transparency of the electoral process, and their possibility to claim corrections to the list. This, again, has a connection with the accountability of the election administration and with the rule of law. In addition, the voters should have the right to present formal complaints with the judiciary concerning misrepresentations in the register. The practice with lists of voters that are open until the polling is closed can be problematic against this background, because a person may have been entered in the register in one constituency or polling station area, but reports for voting in another, which at least in theory opens up the possibility for multiple voting.

In the same vein, restrictions that cannot be justified on objective and reasonable criteria should not exist concerning eligibility, especially no restrictions that are discriminatory (such as education, residence, descent, political affiliation).<sup>50</sup> Hence the registration of voters should give effect to the element of universal suffrage as exactly as possible so as to define the electorate in an unambiguous way. Legal remedies should exist to make it possible for

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<sup>49</sup> The possibility to elaborate objective and reasonable grounds by law, such as established mental incapacity as a ground for denying a person the right to vote or to hold office or conviction for an offence, is recognized in paragraph 4 of the General Comment on Article 25 by the UN Human Rights Committee (*loc. cit.*, note 2). The period of the suspension of the right to vote should, however, be proportionate to the offence and the sentence.

<sup>50</sup> Paragraph 15 of the General Comment on Article 25 (*loc. cit.*, note 2). Of course, the death of a person should automatically result in that the deceased is not entered on the list of voters.

the individuals to bring claims concerning the register of voters before independent judicial bodies for speedy adjudication.<sup>51</sup>

The situation in Bosnia offers a good example. Upon referral of the Provisional Election Commission of Bosnia and Herzegovina, the Election Appeals Sub-Commission (EASC) of the OSCE Mission to Bosnia and Herzegovina has resolved three cases in which fraudulent registration of voters has taken place, apparently by consulates of Bosnia and Herzegovina in Belgium (915 registration applications), Germany (6,000 registration applications) and the United States of America (13,000 registration applications).<sup>52</sup> Approximately one half of the applications were considered false by the EASC. In the case involving the Bosnian consulate in New York City, the EASC concluded that the consulate of Bosnia and Herzegovina in New York City failed to prevent the misuse of passport information within its custody and charged the Ministry of Foreign Affairs of Bosnia with the duty to undertake preventive measures to ensure reliability in its role in the voter registration process. In fact, the EASC found that the irregularities were tolerated or even encouraged by the Ministry in order to achieve other illegitimate ends. The EASC looked into the motives of the fraudulent activity and found that the likely object of it was to increase the share of votes cast by the out-of-country voters for the Party of Democratic Action (SDA) through the by-mail ballots in the next municipal elections. Hence the SDA was held accountable for the irregularities that jeopardized the integrity of the voter registration process. Accordingly, the EASC would remove 15 candidates from the candidate lists of the SDA in the 9 April 2000 municipal elections after the SDA candidate lists

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<sup>51</sup> See also paragraphs 5.10 and 5.11 of the Copenhagen Document of the OSCE, which deal with legal remedies to administrative decisions, reasoned decisions and the indication of the remedies available. In the Bosnian context, the Election Appeals Sub-Commission of the OSCE Mission to Bosnia and Herzegovina is an interesting example of a judicial body created for the adjudication of electoral complaints. Whether the creation of EASC and the relationship between the EASC and the Provisional Election Commission in all respects fulfils the requirements of the rule of law can be discussed, but the EASC has apparently been able to maintain a sufficient independence and integrity. On the powers of the EASC, see, *e.g.*, Case No. 99-ME-06 of 19 July 1999 (Advisory Opinion No. 11) on Voter Eligibility, Case No. 98-GE-25 of 20 July 1998 in the matter of six individual appeals of disapproval of voter registration, and Case No. 98-GE-32 of 4 September 1998 in the matter of two hundred twenty out of country individual voter registration appeals and four in country individual voter registration appeals concerning the 1998 General Elections in Bosnia and Herzegovina, at <http://www.oscebih.org/easc/eng/easc.htm>.

<sup>52</sup> For the cases concerning the consulates in Germany and Belgium, see Case No. 99-ME-08 and Case No. 99-ME-11, both dated on 6 December 1999, and for the case involving the consulate in New York City, see Case No. 99-ME-19 of 27 December 1999, at <http://www.oscebih.org/easc/eng/easc.htm>.



had been submitted and finalized. New candidates could not be used to replace the removed candidates. However, the ultimate objective of the registration fraud should have been even more appalling, that is, to enable the culprits at the consulates to vote by mail in the actual elections by using the ballot papers issued to the fake voters.

## 6. VOTING IN ELECTIONS ON THE BASIS OF THE RIGHT TO VOTE

Voting in elections on the basis of the right to vote is probably the least controversial element of elections and deals directly with issues that arise on the voting day in the polling station. Differently from the right to stand as a candidate, which deals only with elections, the right to vote is also applicable to referendums. The right to vote is an individual right of everyone, defined as a practical matter on the basis of the list of voters. Corroborating evidence of this individual character of the right to vote is the development that Article 3 of Protocol No. 1 to the ECHR has undergone during the past decades: the original text of the article reads that 'the High Contracting Parties undertake to hold free elections . . .', thus creating a *prima facie* obligation for the state, but not any similar individual right for everyone as the other rights in the ECHR. Over the years, the interpretations by the treaty bodies have given the provision the character of an individual right so that it now can be read *de facto* in the following way: 'Everyone has the right to participate in free elections . . .'. Under this interpretation, individual complaints on the basis of the provision are possible under the same conditions as on the basis of the other rights granted by the ECHR.

According to the UN Human Rights Committee, the right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions,<sup>53</sup> as explained above. In addition, states must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Emphasis is hence laid on the 'opportunity' to exercise the right, that is, on the *de facto* possibility to exercise the right to vote. In this respect, positive measures of different kinds in respect of, for instance, handicapped and illiterate persons and also minorities, may be needed. Voter education and registration campaigns are necessary to ensure the effective exercise of Article 25 rights by an informed community, thereamong the special groups

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<sup>53</sup> Paragraph 10 of the General Comment on Article 25 (*loc. cit.*, note 2). Paragraph 14 makes the point that persons who are deprived of liberty but who have not been convicted should not be excluded from exercising the right to vote.

mentioned above.<sup>54</sup> Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice. The UN Human Rights Committee has pointed out that:

[i]n conformity with subparagraph (b) of article 25, elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will.<sup>55</sup>

Any abusive interference with voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced.<sup>56</sup>

As a practical matter, the right to vote would mean for the individual voter that he or she has the right of access to a ballot station on the polling day and that he or she has, in so far the register of voters confirms this, a right to receive his or her ballot paper. The task of the election administration is to make sure that the voter only receives the one ballot paper and that he or she does not receive any other ballot papers, for instance, those of his or her family members (in elections which contain two or more operations or several polls, the voter should, naturally, receive his or her individual ballot papers for all the votes). After the receipt of the ballot paper, this election element contains the right of the voter to cast his or her vote, that is, to make the choice between the different alternatives in the secrecy of the polling booth and to personally deposit the ballot paper in the ballot box. This election element also contains the right of the voter to have his or her vote counted in the appropriate manner after the voting is closed.

## 7. EQUAL SUFFRAGE

The element of equal suffrage can in principle be translated into the formula 'one person, one vote'. This means that each voter who is found on the list of voters can cast the same number of votes, that is, either one vote or, if the

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<sup>54</sup> General Comment on Article 25 (*loc. cit.*, note 2) para. 11.

<sup>55</sup> *Ibid.*, para. 19.

<sup>56</sup> *Ibid.*, para. 11.

electoral system is designed so that several votes may be cast in the same election, as many votes as any other voter. According to the General Comment on Article 25 by the UN Human Rights Committee, '[t]he principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another'.<sup>57</sup> The element of equal suffrage emphasizes the knowledge among the voters that their votes will be of equal value in determining the outcome of the election. It would not, under the rule of equal suffrage, be possible to make the right to vote dependent of the ownership of property so that the right to vote would become graded in accordance with how much property a person happens to own or how much taxes a person pays. In a similar vein, it would probably be problematic against the background of equal suffrage to introduce a system of family vote, where the number of children in a family would determine how many votes the parents would be able to cast.

The equality of the vote contains aspects that are effective already early on during the electoral cycle and not only on the election day. The equal value of the vote is namely greatly influenced by, for instance, the size of the voting districts. Therefore, re-districting should normally improve the equal value of each vote cast over the whole electorate, while a negative effect on the equal value of votes should be avoided. Gerrymandering, that is, intentional worsening of the value of some votes with the purpose of advancing the value of some other votes for partisan political gains, should be prevented.

The equality of vote can also be illustrated by a report involving Hong Kong before its transfer to China, in connection with which the United Kingdom was criticized by the UN Human Rights Committee.

The Committee is aware of the reservation made by the United Kingdom that article 25 of the Covenant does not require establishment of an elected executive or legislative council. However, it takes the view that once an elected legislative council is established, its election must conform to article 25. The Committee considers that the electoral system in Hong Kong does not meet the requirements of article 25, or of articles 2, 3 and 26 of the Covenant. It underscores in particular the fact that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. That clearly constitutes a violation of article 2, paragraph 1 and articles 25 (b) and 26.<sup>58</sup>

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<sup>57</sup> Paragraph 21 of the General Comment on Article 25 (*loc. cit.*, note 2).

<sup>58</sup> Report of the Human Rights Committee, Vol. I, UN doc. A/51/40, para. 65.

The Committee recommended immediate action to ensure that the electoral system conforms with Articles 21, 22 and 25 of the Covenant.<sup>59</sup>

The European Court of Human Rights has, however, made the point that it does not follow from Article 3 of Protocol No. 1 to the ECHR that 'all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate "wasted votes"'.<sup>60</sup> The background to this conclusion in the case of *Mathieu-Mohin and Clerfayt v. Belgium* was that the complicated institutional organization in Belgium prevented a French-speaking person from becoming a member of a Walloon institution unless he or she took an oath of office in the Dutch language. However, they could, under all circumstances, be elected to the French-speaking organs. The point here is that the issue of wasted votes is probably present in most elections. This is so, for instance, in situations in which a number of voters cast their votes for a candidate who does not become elected and the electoral system does not provide for a mechanism through which these votes would contribute to the election of any other candidate. Most electoral systems contain some acceptable distortion of this kind, but when electoral systems are changed or improved, one specific aim could be to diminish the share of the 'wasted votes' as much as possible.

At the practical level, equal suffrage very much relates to the management of ballot papers. For instance, it is necessary to make sure that during the elections, each person entitled to vote receives only one ballot paper and that this same voter casts just one vote. Under the rule of equal suffrage, multiple voting and also voting by proxy should be prohibited. Moreover, the management of ballot papers is important also after the actual voting, so that no ballot papers are lost during the election day, for instance, through letting a voter bring outside the polling station such ballot papers that may have been unused by the voter. The persons in charge of the handling of the ballot papers during the election day and of the counting of the ballots after the closing of the polls should be able to account for all the ballot papers at the end of the counting so that no ballot papers are lost. Equal suffrage is probably also a consideration when during the counting of the votes an invalidation analysis of the votes cast is made. In this context, the rules for invalidating votes should

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<sup>59</sup> Report of the Human Rights Committee, Vol. I, UN doc. A/51/40, para. 71. In addition, Article 7 of the CEDAW obliges the States Parties to the Convention to eliminate discrimination against women in the political and public life of the country. See also Articles I, II, and III of the 1954 Convention on the Political Rights of Women.

<sup>60</sup> See *Mathieu-Mohin and Clerfayt v. Belgium* (*loc. cit.*, note 6), para. 54.

be clear and they should be applied in a consistent manner so that no party or candidate is disadvantaged by invalidating the votes cast for it.

## 8. SECRET VOTE

The element of secret vote means that each voter should be able to cast his or her vote in the privacy of the polling booth. This is important with a view to the possibility of a voter to freely express his or her choice concerning the candidates or parties. A situation of free choice must be created for the voter when he or she is about to fill in the ballot paper. The interpretation of Article 25(b) of the CCPR by the UN Human Rights Committee in 1996 falls well in this line of thinking:

[E]lections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.<sup>61</sup>

This situation of free choice can only be achieved if the act of voting is performed in secret. In the words of the UN Human Rights Committee:

States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or

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<sup>61</sup> Paragraph 19 of the General Comment on Article 25 (*loc. cit.*, note 2). See also paragraphs 25 and 26 of the General Comment. In the comments on the third periodic report of Mexico (UN doc. CCPR/C/79/Add.32, 18 April 1994, paras. 11 and 16), the UN Human Rights Committee expressed doubts and concerns about the electoral system and practices and the climate of violence in which the most important elections of Mexico have taken place. It noted that 'this situation precludes the full guarantee of free choice by all voters and the participation of all citizens in the conduct of public affairs, in particular through freely chosen representatives, in accordance with article 25 of the Covenant'. The Committee suggested to the Mexican authorities that 'they fully implement article 25 of the Covenant, in particular with regard to elections, by taking legal and practical measures to ensure equitable representation of the entire electorate, and to ensure that the balloting is free from fraud and takes place in an atmosphere of calm essential to the voters' exercise of free choice'. The Committee also made the point that the willingness of the authorities to accept international observers during the balloting would contribute to the transparency of the elections.

compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant.<sup>62</sup>

In fact, the secrecy of the vote is so well established in international law and supported by state practice that it should at least be understood as a norm of customary international law, but it could perhaps also be argued that it is a peremptory norm of international law. Hence although it is legitimate to expect transparency of the election administration, for instance, in order to promote election observation, it is completely acceptable that Article 25(b) of the CCPR and Article 21(3) of the UDHR as well as Article 3 of Protocol No. 1 to the ECHR prescribe the secrecy of the vote or the ballot:<sup>63</sup> the choice of the individual elector should never be subject to the transparency requirement. An attempt to institute transparency in respect of the choice of the individual voter through an international agreement or even by means of legislation of a state would, against this background, be invalid. Moreover, states should undertake active measures to make sure that all individual voters cast their votes in secret not only from the election administration and the political parties and candidates, but also from their immediate family members, unless objective grounds exist, for instance, on the basis of a handicap to grant an exception in an individual case.<sup>64</sup> The election law of a state should, against

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<sup>62</sup> Paragraph 20 of the General Comment on Article 25 (*loc. cit.*, note 2).

<sup>63</sup> The rule of the secret ballot is also supported by paragraphs 5.1 and 7.4 of the Copenhagen Document of the OSCE.

<sup>64</sup> According to paragraph 20 of the General Comment on Article 25 (*loc. cit.*, note 2), assistance provided to the disabled, blind or illiterate should be independent. Although practice in a number of countries indicates the opposite, it should be sufficiently clear that wives are not handicapped persons who on the basis of objective and reasonable grounds need the assistance of their husbands in the polling booth. A habit of collective voting inside the family might *de facto* result in the virtual disenfranchisement of half of the electorate, the women. One point of exception to the general characterization of the secrecy of the vote could, however, be raised against the background of the drafting of Article 21 of the UDHR: the secrecy of the ballot caused some concern about its applicability in the British colonies and in countries with direct forms of participation, such as Switzerland, where voting also in elections could, by established tradition, take place in general community meetings out in the open. The colonial concern has disappeared, while, for instance, the Swiss tradition still exists at local government level and justifies the reference in the last sentence of Article 21(3) to 'equivalent free voting procedures'. See also A. Rosas, 1999, p. 435. The reference could, however, also be used to justify mechanisms that make it possible for, for instance, handicapped persons to select an assistant to help him or her vote in the polling booth (see below). The reference to 'equivalent free voting procedures' appears also in paragraphs 5.1 and 7.4 of the Copenhagen Document of the OSCE. On the secrecy of the vote and the obligations of the state in this respect, see also M. Nowak, 1989, p. 481.

this background, contain such provisions on the secrecy of the vote that the secrecy is preserved and can be enforced.

Although paragraph 5.1 of the Copenhagen Document of the OSCE contains the same reference to 'equivalent free voting procedure' in connection to the secrecy of the vote as Article 21(3) of the UDHR and is not limited to the legislature or outlines the people as its basis, but speaks of the representatives of the electors, the paragraph is very much a repetition of Article 3 of Protocol No. 1 to the ECHR. There is one important detail which is not present in any other provision reviewed here, namely the mention that the prevailing conditions shall *in practice* ensure the free expression of the opinion of the electorate. The reference to practice does not necessarily only relate to the conditions of political competition, but also to the functioning of the election administration, so that the election administration will, in practice, have to see to the realization of the freely expressed opinion of the electorate.<sup>65</sup> This places additional emphasis on the importance of the enforcement of the secrecy of the vote.

As a practical matter, the secrecy of the vote is important for several reasons, but only some of them will be presented here. Firstly, if the vote is not secret, it would be possible for a person not only to pay a voter for voting in a certain way, that is, to buy votes, but also to check and verify that the voter actually voted in the way he or she had promised. Secondly, if the secrecy of the vote is not upheld, a habit of voting in the open may develop so that voters perform the act of voting outside the polling booths in, for instance, groups. In such a situation, the 'social environment' may create pressures for the voter to vote according to the general opinion expressed among the voters in the polling station. Such a situation may even be felt as highly intimidating. For these reasons the election law of the country in question should very clearly incorporate the rule of the secrecy of the vote and, moreover, require that it is enforced by the election authorities. One way to promote the secrecy of the vote is to make sure that every polling station has enough polling booths in relation to the size of the number of voters in the polling station area so that all persons who are admitted as voters in a polling station can cast their votes swiftly in the privacy of the polling booth. In addition, whereas it is necessary to keep the ballot box under supervision, it should be guaranteed that nobody can see or verify how the voter actually voted. Therefore, the ballot paper

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<sup>65</sup> In this respect, the presence of military at a political rally with the purpose of intimidating the supporters of the party was considered a violation of the existing rules by the Election Appeals Sub-Commission in Bosnia. As a result, the EASC decided to remove ten candidates to the cantonal assembly of the competing party that was held ultimately responsible for the violation. See Case No. 98-GE-102 and 98-GE-103 of 4 September 1998 at <http://www.oscebih.org/easc/eng/easc.htm>.

should be deposited in the ballot box in a manner which preserves the secrecy of the vote and the ballot paper should also during the counting of the votes be treated in such a manner that the identity of the voter is not revealed.

#### 9. FREE EXPRESSION OF THE WILL OF THE VOTERS

The element of the free expression of the will of the voters is of a summary nature and emphasizes through the expression 'guaranteeing' the importance of a fulfilment of the other election elements for the free expression of the will of the voters. The free expression of the will of the voters is hence the aim of Article 25 of the CCPR. This Article emphasizes the free expression of the will of the electors: if the voters are unsatisfied with their elected governors, the will of the electors may demand a change of those ruling. According to the UN Human Rights Committee, the freely chosen representatives exercise governmental power and 'are accountable through the electoral process for their exercise of that power'.<sup>66</sup> More or less the same is said in Article 21(3) of the UDHR, which speaks about the will of the people as the basis of authority of government: because the will of the people can change, also the government must change accordingly when the people evaluate the performance of their rulers in elections.

Paragraphs 7.1 and 7.2 of the Copenhagen Document make the same point at the level of political competition, and the latter of them is explicit in stipulating that the Participating States will 'permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote'. This is sustained in paragraph 7.6, which emphasizes the necessity of legal guarantees to enable political parties and organizations to compete with each other on a basis of equal treatment before the law and the authorities. The free will of the electors is expected to arise on the basis of a competition between the political contestants. However, as it has been pointed out in many contexts, it is probably impossible to achieve a completely level playing field for the political contestants.

For instance, political parties and candidates can, in most societies, not carry out any significant campaign without sufficient funds at their disposal. At the same time as such funds are needed and the legality of donations to such ends cannot be questioned, campaign financing may come with some strings that attach the party or the candidate to the donor. Although the party is not the person acting in his or her official capacity and although the candidate is not yet the possessor of the mandate he or she is running for, some

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<sup>66</sup> Paragraph 7 of the General Comment on Article 25 (*loc. cit.*, note 2).



returns or political advantages may be expected by the donors of the campaign funds. In this respect, the line between campaign funding and corruption can be very thin and unclear. To prevent the legitimate campaign funding from transgressing the line and becoming a non-legitimate method of influence, some measure of regulation concerning campaign financing could be expected. This has been identified as an area of possible legislative action by the UN Human Rights Committee: 'Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party'.<sup>67</sup> By means of transparency, the possible strings could be made visible to the electorate and to the actors in that political process which takes place in the decision-making forums at which the elected persons eventually function. The formulation of the will of the voters is also affected as a practical matter, for instance, by the opinion polls published before the elections. In some countries, the publication of such polls is, however, not permitted just before the elections. This could potentially be a limitation of the freedom of expression and of the press in Article 19 of the CCPR, but good reasons can be presented for such practices.

The legitimacy of the government is what Article 25 of the CCPR (and also Article 21 of the UDHR) try to provide by linking the government to the will of the people and the electorate. The element of the free expression of the will of the electors contains many moments of the electoral cycle, but the main thrust of this element is on the election day (elements of equal suffrage and secret vote, see above), on the counting of the votes and on the transmission of the results to the higher echelons of the election administration. On the counting of the votes, the election administration is liable for the correct representation of the result of the elections from the level of the polling station up to the highest level of election administration so that the opinions of the electors are correctly transmitted to and aggregated into an overall election result.

This particular issue is addressed in somewhat narrower terms in paragraph 7.4 of the Copenhagen Document of the OSCE, when stipulating that the votes 'are counted and reported honestly with the official results made public'. The point of departure is that if all polling stations manage to make a correct representation of the result of the elections in their polling station area and if these opinions of the electors are correctly transmitted to the higher levels of election administration (such as, regional election committees and the national election committee), then already the technical performance of the

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<sup>67</sup> See paragraph 19 of the General Comment on Article 25 by the UN Human Rights Committee (*loc. cit.*, note 2).

elections may warrant a positive label for the elections. Against the background of what was said about the right to vote above, the expression of the will of the voters also means that the individual voter has the right to expect that his or her vote is counted and that the vote through that counting influences the outcome of the elections in the intended way. The election administration should therefore be understood as being under an obligation to count all votes and to account for all votes cast.

Normally, this element would also result in an understanding that the 'majority' has won in the elections, whatever the majority may mean in a more concrete fashion. The free expression of the will of the electors should, finally, lead to the consequence that seats in the parliament (or in other bodies, as the case may be) are actually changed, that is, that the possessors of those mandates in at least one chamber of the parliament who have lost in the contest actually leave their seats to the newly chosen representatives.<sup>68</sup>

The issue of the free expression of the will of the electors is, of course, not finished with the more internal safeguards in this respect, but must contain a possibility to bring issues dealing with the elections to an external review of their legality. For this reason, complaints mechanisms should be in place so that the voters as well as the parties and candidates are given the opportunity to claim their rights before the judiciary and raise claims about the conduct of the election administration all the way from voter registration to the allocation of mandates. For instance, under Article 2(3) of the CCPR, each State Party undertakes to ensure that any person whose rights or freedoms recognized in the CCPR are violated has an effective remedy.<sup>69</sup> The remedy should preferably be a judicial one.<sup>70</sup> In terms of the UN Human Rights Committee, '[t]here should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes'.<sup>71</sup> The ultimate

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<sup>68</sup> See also paragraph 7.9 of the OSCE Copenhagen Document, which extends itself to the allocation of seats and to the functioning of the duly installed representatives.

<sup>69</sup> See the case of *C. F. et al. v. Canada*, in which the UN Human Rights Committee dealt with the issue of whether a declaratory judgment by an administrative court before the elections concerning three prisoners with the right to vote could be an effective remedy. Communication No. 113/1981, decision of 12 April 1985, Report of the Human Rights Committee, UN doc. A/40/40, pp. 217-225.

<sup>70</sup> This is supported by paragraph 5.10 of the Copenhagen Document of the OSCE: '[E]veryone will have an effective means of redress against administrative decisions, so as to guarantee respect for fundamental rights and ensure legal integrity'. This was, *e.g.*, in Bosnia realized through the Election Appeals Sub-Commission.

<sup>71</sup> Paragraph 20 of the General Comment on Article 25 (*loc. cit.*, note 2).

remedy should be the disqualification of the elections with the practical outcome of new elections to be organized either in the whole country or in the constituency that has been affected by misconduct.

## 10. CONCLUSIONS

The various states are under the duty to implement the rules and principles related to the electoral cycle and to specify them in their constitutions and especially in their election legislation. Hence the rights of political participation among international human rights have a lot of implications for elections at the national level. There should be the widest possible right of individuals not only *de jure* but also *de facto* to vote and to stand for election. Although the inclusiveness of a political system is to be judged against the background of the citizenship requirement at least as concerns the national elections, it is important that the list of voters is, within this category of individuals, as universal as possible and does not misrepresent the electorate or restrict its extension on unreasonable grounds. In the absence of an explicit right to public documents and a general right of access to meetings of public bodies, the electoral process should nevertheless be designed in a transparent fashion so that a confidence is created among the voters towards the electoral process. At the same time, the electoral process must create an accountability through its independence and impartiality which will result, for instance, in non-corrupt practices and in valid and reliable results concerning the outcome of competitive elections in which the voters have given expression to their political preferences. The ultimate aim of the rules governing elections is to cater for the free expression of the will of the electorate.

The right to participation is particularly well-specified in the area of the electoral process, within which a number of well-established rules exist. A summary of what elections should look like under Article 25 of the CCPR is contained in the General Comment on Article 25 by the UN Human Rights Committee:

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

or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.<sup>72</sup>

The rules of participation in elections constitute the necessary, albeit probably not the sufficient,<sup>73</sup> conditions for a viable electoral process that could, in relation to any particular elections, result in the qualification of such elections as, for instance, free and fair in the meaning of the Copenhagen Document of the OSCE.<sup>74</sup> It is, however, not enough that one or a few elections are granted a quality label of that kind. For a legitimate political system to exist, the elements of the electoral cycle must be present on a continuous basis in the electoral process and should undergo constant review and perfection. Each turn of the electoral cycle should bring the process to a higher level of perfection so that the election elements are ever better implemented and realized (see Table 2, below).

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<sup>72</sup> Paragraph 21 of the General Comment on Article 25 (*loc. cit.*, note 2).

<sup>73</sup> A number of additional conditions, such as campaign financing, control counting of the votes, internal decision-making processes of the parties, etc., could be mentioned in this context, but they appear at least partly to fall outside the requirements on elections put by, e.g., Article 25 of the CCPR.

<sup>74</sup> The jargon of 'free and fair elections' entered the United Nations system at least as early as in 1993, when General Assembly Resolution 48/131 (20 December 1993) on enhancing the effectiveness of the principle of periodic and genuine elections recognized that 'the fundamental responsibility for ensuring free and fair elections lies with Governments' and when the Vienna Declaration and Programme of Action, adopted by the World Conference of Human Rights in June 1993, mentioned assistance upon the request of governments for the conduct of free and fair elections for the strengthening of a pluralistic civil society. For an indication of elections that were not so free and fair—and consequently out of line with the principles of good governance—see the ODIHR final report on the October 1999 elections in Kazakhstan, section 2, which concluded that 'the two-round elections of Deputies to the Majlis of the Parliament of the Republic of Kazakhstan on 10 and 24 October, while constituting a tentative step towards international standards and an improvement from previous elections, fell short of the OSCE commitments formulated in the 1990 Copenhagen Document. These commitments for universal, equal, fair, secret, free, transparent, and accountable elections were severely marred by widespread interference by executive authorities in the electoral process'. See <http://www.osce.org/odihr/election/>.

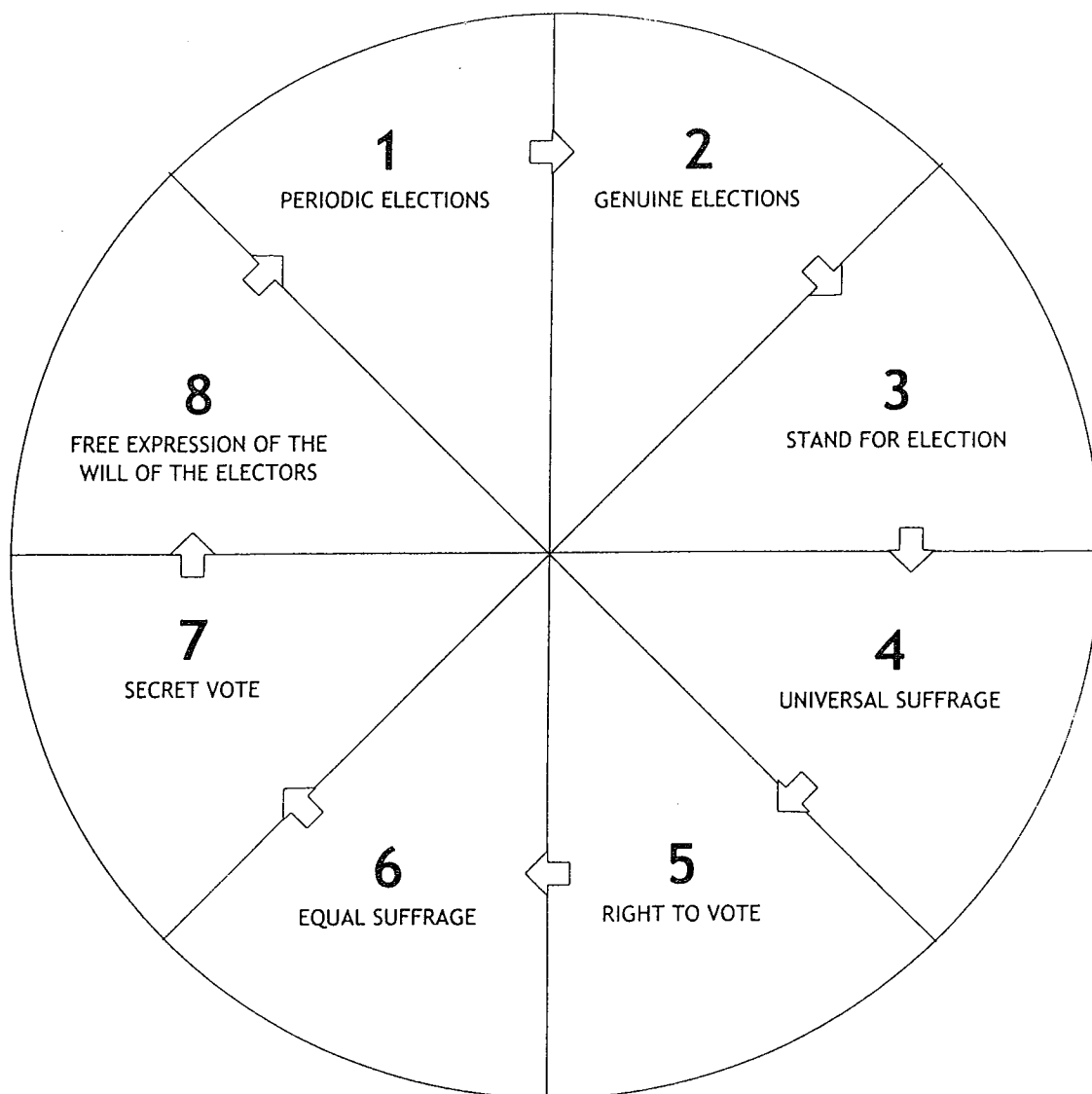


Table 2. The Electoral Cycle

There is, nevertheless, still some disagreement at the level of the United Nations concerning the ways in which the international community and the various states can promote the principle of periodic and genuine elections. Since 1988 (General Assembly Resolution 43/157)—that is, when the Soviet Union already had started to implement its policies of *glasnost* and *perestroika* and when many of the Socialist countries in the world already were about to enter the path of constitutional transformation—the UN General Assembly has almost annually adopted a resolution entitled ‘Enhancing the effectiveness of the principle of periodic and genuine elections’.<sup>75</sup> In the beginning, the United

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<sup>75</sup> See, e.g., General Assembly Resolutions 44/146 (15 December 1989); 45/150 (18 December 1990); 46/137 (17 December 1991); 47/138 (18 December 1992); 48/131 (20

Nations, while accounting for the political rights essential for periodic and genuine elections, criticized the South African apartheid system and the tricameral parliament established under that system. For instance, the resolution of 1991 made the point that each state had its sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states, but also emphasized that the electoral systems shall conform with the relevant requirements of the UDHR and the CCPR.<sup>76</sup>

However, after the transformation of the South African Constitution, this traditional resolution has become more focused on the electoral process and in 1997, the General Assembly noted that first-time democratic elections have already been held in many Member States, thereby making the point that by implication, there still exists states in the world in which democratic elections have never been held. The resolutions, aimed at providing electoral assistance of all kinds at the request of the state concerned, were originally supported especially by the Western countries and by countries aspiring at democracy. The number of states supporting the resolution has been growing during the decade after the first resolution. Countries not supporting the resolution by abstaining in, for instance, 1997 were Brunei Darussalam, China, Cuba, Democratic People's Republic of Korea, Democratic Republic of the Congo, Iran, Lao People's Democratic Republic, Libya, Myanmar, Sudan, Syria, Uganda, United Republic of Tanzania, Viet Nam and Zimbabwe.<sup>77</sup>

Almost from the beginning of the decade of enhancing the principle of periodic and genuine elections, a number of countries of a non-Western or non-democratic nature have annually promoted a parallel General Assembly resolution on 'Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes'.<sup>78</sup> In these resolutions, the General Assembly recognizes that the principles of

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December 1993); 49/190 (23 December 1994); 50/185 (22 December 1995); 52/129 (12 December 1997); and 54/173 (17 December 1999). See also Report of the Secretary-General on enhancing the effectiveness of the principle of periodic and genuine elections, UN doc. A/54/491, 25 October 1999. The report deals with UN efforts in the areas of, *e.g.*, technical assistance, census, assessment missions, election observation, etc.

<sup>76</sup> General Assembly Resolution 46/137 (17 December 1991).

<sup>77</sup> Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization, General Assembly Resolution 52/129 (12 December 1997), vote: 157-0-15.

<sup>78</sup> General Assembly Resolutions 44/147 (15 December 1989); 45/151 (18 December 1990); 46/130 (17 December 1991); 47/130 (18 December 1992); 48/124 (20 December 1993); 49/180 (23 December 1994); 50/172 (22 December 1995); and 52/119 (12 December 1997).

national sovereignty and non-interference in the internal affairs of any state should be respected in the holding of elections and that there is no single political system or single universal model for electoral processes equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors. This is perhaps acceptable from the point of view of human rights, at least as long as the states achieve the ultimate aim of elections, the free expression of the will of the electors. In essence, however, these resolutions make a relativist counter-argument to the political rights enshrined in the international human rights instruments and they were, in 1997, supported by the same countries that abstained from voting in the matter of the so-called 'Enhancing resolution' and by a number of countries especially in the third world. Countries that voted against this so-called 'Respect of national sovereignty resolution' included the Western countries and the countries that had already been democratized or that were on the path towards democracy.<sup>79</sup>

The human right of participation nevertheless is a right at the level of international law the observance of which is important at the level of the states. Ever since the latter part of the 1980s, the practice has developed that elections in the various states are actually monitored by election observers. Election observation is an activity in which at least the international election observers try to assess the carrying out of the elections against the background of the international norms and standards concerning elections. Observers are not directly involved in the voting in a particular polling station, but are used to follow the performance of the electoral administration and to evaluate the various aspects of the electoral process. These monitors can be of two different kinds, domestic and international. In fact, the international norms on participation and Article 25 of the CCPR in particular offer a strong justification for election observation.

Election observation can, in this light, be viewed as a voluntary verification of the compliance of a state with the international norms on participation. Against the background of the electoral cycle presented in this paper, Article 25 actually broadens the scope from mere short-term observation (STO) with the main focus on the election day to a more thorough long-term observation (LTO) that takes into account at least the adjacent political rights and emphasizes the need to support any STO activities through a strong LTO involvement. The observation of the whole electoral cycle by election observers should, naturally, also cover the last phases of the cycle, that is, the

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<sup>79</sup> Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes, General Assembly Resolution 52/119 (12 December 1997), vote: 96-58-12.

transfer of power to those who won the elections. There should be a regular feedback of the results of election observation to the country that has been observed, with the expectation that the findings are taken into account when the next turn of the electoral cycle is starting. Hence election observation should be understood as a facilitation of an ever better realization of the right to participation in the electoral field and—to some extent—as a process of consultation in relation to the state in question so that the next elections could be improved in respect of the aspects that the findings may have brought up. The final aim of the feedback after election observation, when taken into consideration, should be to make election observation superfluous at least in its STO fashion.

Paragraph 8 of the Copenhagen Document of the OSCE can be seen as an important step at the international level to facilitate election observation, not only by making it possible for domestic election observers to observe the workings of the electoral process but also by presenting a standing invitation to other states and organizations outside the state in question to send international election observers. This is a significant opening in the direction of a more permanent verification of the conduct of a state, and most of the countries in Central and Eastern Europe have made provisions in their election laws for such election observation early on during their transition. West European countries have not followed suit to any greater extent at the level of legislation, although election observers have occasionally been invited also to observe elections in the more established political systems. It would, however, seem important to place also the 'Western' electoral processes under outside review, for instance, for reasons of providing ideas for the improvement of these national processes.

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# ELEMENTS OF THE ELECTORAL PROCESS: INTERPRETATIONS AND PRACTICES OF INTERNATIONAL BODIES ON ELECTION ELEMENTS DERIVABLE FROM ARTICLE 25 OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AS CRITERIA FOR ASSESSING THE ELECTORAL PROCESS

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## 1. INTRODUCTION

Free and fair elections are considered a crucial starting-point after years of conflict or totalitarian government and are often a condition for international development co-operation. Therefore, international organizations are providing electoral assistance to states in transition to democracy and are sending international election observation missions to these states.

Various international organizations have sent election observation missions. These missions have been sent as part of peacekeeping missions of the United Nations or have been designed as an independent mission. Other, regional organizations, such as the European Union (EU), the Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE), have also engaged themselves in similar projects. In the case of the United Nations, the Electoral Assistance Division of the Department of Political Affairs (DPA) is in charge of matters related to election observation missions in co-ordination with the Department of Peacekeeping Operations.

Election observation (long term) is considered as a part of electoral assistance. It is, however, distinct from other parts of electoral assistance, such as legal advice in drawing the electoral law or civic education, the two latter being much more based on co-operation and interaction. The final decisions are with the state authorities. In the case of election observation, after the state where the elections are to be observed has formulated an invitation and has also issued credentials for the observers, the election observation mission is supposed to work without interference. The state authorities co-operate with the observation mission but they do not, obviously, take part in the observation itself; hence, the state sovereignty is less absolute. This greater independence of election observation missions implies also a higher degree of responsibility in how the mission is operating. Shortly after the election the head of mission makes a statement about the freeness and fairness of the observed elections.

The term of free and fair elections or democratic elections is not self-evident. The various organizations involved in election observation have developed over the years guidelines and internal principles to define this term. In this way, the assessment of elections, which is the purpose of each and every election observation mission, is based on internal guidelines. The question is whether these should rather not include incidental formulations used by the organizations, but have their basis in human rights instruments such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (CCPR).<sup>1</sup>

Looking from the human rights perspective, election observation is a monitoring mission for political rights. Usually, human rights bodies are the competent organs in dealing with the monitoring of human rights implementation. These bodies adopt a vast number of findings, views and decisions on human rights. So, if one accepts the point that election observation does operate in the field of human rights, then, election observation missions should be rethought. (1) On what standards should election observation be based? (2) Should the international legal principles be a guideline for the assessment of the elections by these missions? (3) How do human rights monitoring bodies and other organizations understand election related issues? (4) Are these understandings sufficiently developed in order to form the central element of handbooks<sup>2</sup> on election observation or other guidelines or codes of conduct? (5) And can they form the basis of election observation? The last three questions are instrumental to the first and second question and need to be answered in the first place. Therefore, the focus in the central sections of this study will be on the material produced by the human rights bodies and other organizations.

The United Nations General Assembly provides an indication that the link between human rights and elections is relevant in its resolutions on enhancing the effectiveness of the principle of periodic and genuine elections<sup>3</sup>

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<sup>1</sup> If one looks, for example, at the Administration and Cost of Elections Project (ACE Project), no reference to international human rights law is made. As legislative framework for the electoral process the ACE Project enumerates constitutional rules, electoral laws, complementary regulations and codes of conduct. See Legislative Framework, Legal Instruments, at <http://www.aceproject.org>. (The ACE Project is a joint endeavour of the International IDEA, the UN Department of Economical and Social Affairs and the International Foundation for Electoral Systems; the section on Legal Instruments is drafted by Helena Alves).

<sup>2</sup> See, e.g., *The ODIHR Election Observation Handbook*, 1999.

<sup>3</sup> General Assembly resolutions 43/157 (8 December 1988); 44/146 (15 December 1989); and 45/150 (18 December 1990).

with explicit reference to the UDHR and the CCPR. However, these resolutions did not always point in the same direction. Over the years the General Assembly adopted resolutions which, on the one hand, underwent a certain evolution but, on the other, also counterbalanced each other. One can identify three main types of General Assembly resolutions related to elections. The first was adopted almost yearly during the 1980s and the beginning of the 1990s. The purpose of these resolutions 'on the policies of apartheid of the Government of South Africa'<sup>4</sup> was mainly to condemn apartheid, but they also served to stress the need for human rights and, more specifically, political rights.

It is incumbent on the international community to provide all necessary assistance to the oppressed people of South Africa . . . in their legitimate struggle for the establishment of a democratic society in accordance with their inalienable rights, as set forth in the Charter of the United Nations and the Universal Declaration of Human Rights.<sup>5</sup>

*Reaffirming* the legitimacy of the struggle of the oppressed people of South Africa . . . for the establishment of a society in which all the people of South Africa as a whole, irrespective of race, colour or creed, will enjoy equal and full political and other rights and participate freely in the determination of their destiny.<sup>6</sup>

The General Assembly resolutions 'on enhancing the effectiveness of the principle of periodic and genuine elections',<sup>7</sup> the second type, have their roots in the resolutions adopted with regard to South Africa. The first of the resolutions on enhancing the effectiveness of the principle of periodic and genuine elections was adopted in 1988. The General Assembly refers to the relevant provision of the UDHR and the CCPR in its first four resolutions on

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<sup>4</sup> General Assembly resolutions 36/172 (17 December 1981); 37/69 (9 December 1982); 39/72 (13 December 1984); 40/64 (10 December 1985); 41/35 (10 November 1986); 42/23 (20 November 1987); 43/50 (5 December 1988); 44/27 (22 November 1989); 45/176 (19 December 1990); 46/79 (13 December 1991); and 47/116 (18 December 1992).

<sup>5</sup> General Assembly resolution 36/172 (17 December 1981), Preamble. South Africa ratified the CCPR on 10 December 1998. Therefore, no reference was made to the CCPR.

<sup>6</sup> General Assembly resolution 39/72 (13 December 1984), Preamble. See also resolution 43/50 (5 December 1988).

<sup>7</sup> General Assembly resolutions 43/157 (8 December 1988); 44/146 (15 December 1989); 45/150 (18 December 1990); 46/137 (17 December 1991); 47/138 (18 December 1992); and 48/131 (20 December 1993). From 1994 on the resolutions are called 'strengthening the role of the United Nations in . . .'. Resolution 49/190 (23 December 1994); 50/185 (22 December 1995); 52/129 (12 December 1997) vote: 157-0-15; and 54/173 (17 December 1999).

this item,<sup>8</sup> Article 21 of the UDHR and Article 25 of the CCPR, and highlights the importance of genuine periodic elections for the realization of other human rights.

[P]eriodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and . . . as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, including political, economic, social, and cultural rights.<sup>9</sup>

From 1993<sup>10</sup> to 1997 the General Assembly recalls the Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, to make the link to human rights. However, the main concern is electoral assistance as a means to:

ensure the continuation and consolidation of the democratization process in certain Member States requesting assistance, including the provision of assistance before and after elections have taken place and needs-assessment missions aimed at recommending programmes which might contribute to the consolidation of the democratization process, and requests that such efforts be strengthened.<sup>11</sup>

Reference to the UDHR and the CCPR as legal basis is no longer made. On the other hand, the resolutions from 1993 to 1997 do not explicitly mention state sovereignty as limiting electoral assistance. A softening in the language can be observed. State sovereignty only remains in the requirement of a request by the state for electoral assistance. This requirement is maintained throughout all resolutions. In the previous resolutions, the General Assembly was giving national sovereignty more weight by '[r]ecalling that all States enjoy sovereign equality and that each State has the right to freely choose and develop its political, social, economic and cultural systems'.<sup>12</sup>

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<sup>8</sup> General Assembly resolutions 43/157 (8 December 1988); 44/146 (15 December 1989); 45/150 (18 December 1990); and 46/137 (17 December 1991).

<sup>9</sup> General Assembly resolution 43/157 (8 December 1988), para. 2. See also the other resolutions listed in note 8.

<sup>10</sup> General Assembly resolution 47/138 (18 December 1992) refers to the previous resolutions but deals mainly with organizational matters of the UN system related to electoral assistance.

<sup>11</sup> See, *e.g.*, General Assembly resolution 49/190 (23 December 1994), para. 4.

<sup>12</sup> See, *e.g.*, General Assembly resolution 45/150 (18 December 1990), Preamble.

The third type of resolutions have state sovereignty as an object. These General Assembly resolutions on 'the respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes' are a response to the resolutions on periodic and genuine elections.<sup>13</sup> The content of the resolutions on state sovereignty is quite the same over the years and focuses on the principle of sovereignty and the relativity of the right to vote subject to the specific circumstances of the country.

Recognizing that the principles of national sovereignty and non-interference in the internal affairs of any State should be respected in the holding of elections,

Also recognizing that there is no single political system or single model for electoral processes equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors.<sup>14</sup>

Only in the 1999 resolution the first part is maintained but the part on the relativism of the electoral process is formulated in a more restricted manner:

*Recognizing also* the richness and diversity of political systems and models for electoral processes in the world, based on national and regional particularities and various backgrounds.<sup>15</sup>

The language of this resolution is changed also with regard to electoral assistance.

[E]lectoral assistance to Member States should be provided by the United Nations at the request of interested States, or in special circumstances such as cases of decolonization, or in the context of regional or international peace processes.<sup>16</sup>

In previous resolutions electoral assistance was regarded as interference in the internal affairs of states and as an offence against state sovereignty. There was

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<sup>13</sup> General Assembly resolutions 44/147 (15 December 1989); 45/151 (18 December 1990); 46/130 (17 December 1991); 47/130 (18 December 1992); 48/124 (20 December 1993); 49/180 (23 December 1994); 50/172 (22 December 1995); 52/119 (12 December 1997) vote: 96-58-12; and 54/168 (17 December 1999).

<sup>14</sup> General Assembly resolution 44/147 (15 December 1989), Preamble. See also the other resolutions from 1990 to 1997 listed in note 13.

<sup>15</sup> General Assembly resolution 54/168 (17 December 1999), Preamble.

<sup>16</sup> *Ibid.*, para. 4.

an attempt to limit it as far as possible by maintaining that 'there is no universal need for the United Nations to provide electoral assistance to Member States, except in special circumstances'.<sup>17</sup>

The formulation of no universal need to provide electoral assistance has been replaced by the indication of the cases when electoral assistance should be provided, such as cases of decolonization or in the context of regional or international peace processes. State sovereignty is becoming less absolute when it comes to electoral assistance provided by the United Nations. These are only minimal changes. But bearing in mind that the resolutions had hardly any changes before 1999 this development becomes significant. There has been an interesting development in the 1999 resolutions as far as the resolution on genuine and periodic elections is concerned.<sup>18</sup> For the first time since 1991 the UDHR is mentioned again. In a resolution parallel to those on genuine and periodic elections, the resolution on promoting and consolidating democracy, the UDHR and international human rights treaties are referred to. In this resolution from 2000, the General Assembly:

[c]alls upon States to promote and consolidate democracy, inter alia, by . . .  
[d]eveloping, nurturing and maintaining an electoral system that provides for the free and fair expression of the people's will through genuine and periodic elections.<sup>19</sup>

This resolution formulates a broader approach to elections by including freedom of association, the representation of minorities and an independent and pluralistic media.

Taking the 1999 resolution on genuine and periodic elections and the 2000 resolution on promoting and consolidating democracy together one can observe a return of the rights language when it comes to elections, with the benefit of the 'lessons learnt' that elections are not a one-time exercise.<sup>20</sup> In these circumstances the question of how human rights monitoring bodies and other organizations understand election observation related issues becomes even more important to answer. The General Assembly resolutions are to be filled with content and precise rules. In this way 'self-made' principles and

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<sup>17</sup> General Assembly resolution 46/130 (17 December 1991), para. 4.

<sup>18</sup> General Assembly resolution 54/173 (17 December 1999).

<sup>19</sup> General Assembly resolution 55/96 (4 December 2000), para. 1(d).

<sup>20</sup> General Assembly resolution 52/129 (12 December 1997); vote: 157-0-15. 'Recommends that the Electoral Assistance Division continue to provide post-election assistance, as appropriate, to requesting States and electoral institutions, in order to contribute to the sustainability of their electoral processes'.

guidelines could be avoided and expressions like free and fair elections would have a clear meaning shared by all actors involved in elections.

The CCPR is the human rights instrument with universal application. Its Article 25 provides various elements or principles regarding elections.

#### *Article 25*

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- c) To have access, on general terms of equality, to public service in his country.

The elements resulting from the wording of paragraph (b) are: the right to vote, the right to be elected or to stand as a candidate, genuine elections, periodic elections, universal suffrage, equal suffrage, secret ballot and the free expression of the will of the electors.<sup>21</sup>

These elements will be used to break up the provision of the CCPR into different parts. Along these elements the findings of the different human rights bodies and organizations will be exposed. It is, however, important to keep in mind that the different elements cannot be considered completely isolated from each other. All these elements together describe how elections should be realized according to the CCPR. The understanding of the nature of the right to participation contained in Article 25, as a whole, is as important as the understanding of its different elements.

The elements are logically realized at different stages. That Article 25 of the CCPR implies a time frame becomes already clear if one thinks about the right to stand for elections and the right to vote. Standing for election requires a candidate's registration process and campaigning. These necessarily precede the election day. All elements together form a long process. The element of periodic elections points to the fact that elections are not a one-time exercise but something that comes again and again at certain intervals. Together with

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<sup>21</sup> A different division is adopted by Fox: 'The . . . global and regional treaty systems [reveal] that a free, fair, and legally sufficient election consists of the following four elements: (1) universal and equal suffrage; (2) secret ballot; (3) elections at reasonable periodic intervals; and (4) an absence of discrimination against voters, candidates, or parties'. G. H. Fox, 2000, p. 69. However, this division leaves out the formulation of rights and is therefore not appropriate for this study.

the remaining elements it becomes clear that elections are a complex process. However, it would be wrong to isolate different processes. It is true that there are more intensive phases, such as around the election day, and less intensive or visible phases. But work done for one election should serve also the following. Voter registration and education can benefit many elections even when new voters must be included as they reach a certain age. The electoral process can be seen as a cycle<sup>22</sup> following a chronological order. Another argument for the cyclical character of Article 25 is that the right to participate in the conduct of public affairs contained in paragraph (a), is a continuous right and that one can extend this concept also to paragraph (b).

The elements of Article 25 form the next sections of this study in the chronological order of the electoral cycle. It is, however, not possible to consider all elements; the element of periodic elections is excluded. It is assumed that elections do take place and that they are organized by an election administration. The free expression of the will of the electors is also not considered. The following four sections will be on standing for elections, genuine elections, universal suffrage and equal suffrage and secret vote. The last two elements both relate to the election day and are, therefore, considered jointly in one section. The right to vote is not considered separately but under universal suffrage.

The human rights bodies' understanding of each of these elements will be exposed. The bodies included are, for the United Nations system, (1) the Human Rights Committee, (2) the Committee on the Elimination of Racial Discrimination, (3) the Committee on the Elimination of Discrimination against Women and (4) the Commission on Human Rights. As for the regional systems,<sup>23</sup> the bodies examined are: (5) the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights of the Organization of American States, (6) the European Court of Human Rights of the Council of Europe and (7) the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe. The conclusions form the last section.

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<sup>22</sup> The idea of the electoral process as a circle was originally presented by Markku Suksi and was further developed during discussions of this study. See also the contribution by Suksi to this book.

<sup>23</sup> The African Charter on Human and Peoples' Rights is excluded from this study. The European Court of Human Rights and the Inter-American Court of Human Rights base their decisions on Article 3 of Protocol No.1 to the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 23 of the American Convention on Human Rights, respectively. However, the legal elements of these articles correspond to those of Article 25 of the CCPR. Therefore, they are not considered separately in this study.



To complete this introduction, a brief overview of the above-mentioned bodies is provided. The Human Rights Committee, established under Article 28 of the CCPR, monitors the implementation of the provisions of the CCPR. It fulfils this function by studying reports submitted by States Parties to the Covenant under Article 40. The Committee adopts concluding observations on each state report. In order to support states in the drafting of the reports, the Committee has developed guidelines regarding the form and contents of reports from States Parties. However, these guidelines are not binding on states.<sup>24</sup> In addition, the Human Right Committee adopts general comments on the interpretation of the provisions of the CCPR. Article 1 of the Optional Protocol to the CCPR gives the possibility for individuals to submit their cases directly to the Human Rights Committee. Many states would not have signed the CCPR if the individual complaint procedure had been included in the Convention itself. The views adopted by the Human Rights Committee are not legally binding on states.

The Committee on the Elimination of Racial Discrimination was established under Article 8 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD). As in the case of the CCPR, states are under the obligation to submit periodic reports (Article 9). The Committee on the Elimination of Racial Discrimination equally adopts general recommendations on the provisions of the Convention. An individual complaint procedure is foreseen in Article 14, which is optional. The relevant provision of the CERD is Article 5(c).<sup>25</sup>

The Committee on the Elimination of Discrimination against Women was established under Article 17 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). States Parties to the CEDAW are under the obligation to submit their report on the measures adopted to give effect to the treaty provisions every four years (Article 18). The Committee on the Elimination of Discrimination against Women adopts concluding observations on the state reports as well as general recommendations. The

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<sup>24</sup> M. Nowak, 1993, p. 558. For the guidelines, see, *e.g.*, UN doc. HRI/GEN/2/Rev.1, pp. 26-31.

<sup>25</sup> Article 5 of the CERD: 'In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: . . . (c) Political rights, in particular the right to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service'.

relevant provision of the CEDAW for this study is Article 7(a).<sup>26</sup> The Committee receives communications submitted by or on behalf of individuals or groups of individuals.<sup>27</sup>

The 1235-procedure, named after the number of the resolution of the Economic and Social Council, gives the Commission on Human Rights the possibility to investigate human rights violations. Independent experts are designated as Special Rapporteurs or together with others as a Working Group. This procedure is public. Special Rapporteurs are given the competence to investigate the human rights situation in a certain country (country mechanism) or to investigate the situation of a certain human right throughout the world (thematic mechanism). The establishment of a Special Rapporteur on elections was proposed<sup>28</sup> but not accepted. The 1503-procedure is confidential. This procedure gives individuals the possibility to submit communications concerning human rights violations. If such violations become evident as a consistent pattern the Commission investigates them.

The Inter-American Court of Human Rights was established under Article 33(b) of the American Convention on Human Rights (ACHR). Individual cases can be analysed by the Court but only the Inter-American Commission on Human Rights can submit a case to the Court (Article 61 of the ACHR). The relevant provision of the ACHR for this study is Article 23(1)(b).<sup>29</sup> However, the Inter-American Court of Human Rights has not analysed any case under Article 23 so far.

Article 23 of the ACHR has only been under consideration in cases before the Inter-American Commission on Human Rights. The Commission is an organ that operates under the ACHR (Article 33(a)) and under the Charter

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<sup>26</sup> Article 7 of the CEDAW: 'States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right: (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies'.

<sup>27</sup> Articles 1 and 2 of the Optional Protocol to the CEDAW, adopted by General Assembly resolution A/54/4 (6 October 1999). Due to the fairly recent entry into force (22 December 2000), no jurisprudence is available so far.

<sup>28</sup> Proposed by the United States delegation to the 1993 World Conference on Human Rights in Vienna. US Draft Human Rights Action Plan, 1993, p. 2.

<sup>29</sup> Article 23 of the ACHR: 'Right to Participate in Government. 1. Every citizen shall enjoy the following rights and opportunities: . . . b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters . . . 2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings'.

of the Organization of American States (Article 53(e)). It receives individual petitions (Article 44 of the ACHR) and decides on the admissibility and on the merits of the petition. The Commission can decide to submit the case to the Inter-American Court of Human Rights if a friendly settlement is not realized. In addition, the Commission adopts reports on the human rights situation in countries members to the OAS but not necessarily parties to the ACHR. Both organs of the inter-American system will be included in this study. Whenever available, the jurisprudence of the Inter-American Court of Human Rights will be given primacy.

Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights; ECHR) abolished the European Commission of Human Rights, established under former Article 19 of the ECHR. Protocol No. 11 entered into force 1 November 1998. It established, under (new) Article 19, one single European Court of Human Rights. According to Article 32 of the ECHR, the jurisdiction of the Court extends to all matters concerning the interpretation and application of the Convention and its Protocols. The European Court of Human Rights can consider inter-state cases (Article 33) and individual applications (Article 34). The final judgments of the Court are binding on states (Article 46). The relevant provision of the ECHR for this study is Article 3 of Protocol No. 1 to the ECHR.<sup>30</sup>

The Office for Democratic Institutions and Human Rights (ODIHR) was set up by the (at that time) Conference on Security and Co-operation in Europe as the then called Office for Free Elections. The ODIHR sends election observation missions to OSCE Member States upon invitation. Final reports on election observation of the ODIHR give an inside view on how the legal elements are taken up in the practical work of election observation. The relevant parts for elections of the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe (1990), are paragraphs 5<sup>31</sup> and 7.<sup>32</sup>

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<sup>30</sup> Article 3 of Protocol No. 1 to the ECHR: 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature'.

<sup>31</sup> Paragraph 5: 'They solemnly declare that among those elements of justice which are essential to the full expression of the inherent dignity and of the equal and inalienable rights of all human beings are the following: (5.1) free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives'.

<sup>32</sup> Paragraph 7: 'To ensure that the will of the people serves as the basis of the authority of Government, the participating States will:  
(7.1) hold free elections at reasonable intervals, as established by law;

## 2. STANDING FOR ELECTIONS

### 2.1 Background

In the literature the right to stand for elections in Article 25 of the CCPR is understood in the light of the principle of universal suffrage.<sup>33</sup> It is limited to citizens and can be subject to reasonable restrictions if not excessive or discriminatory. The restrictions permissible are farther-reaching than the ones for the right to vote. Justified restrictions are the requirement of a higher minimum age than that for voting for the case of standing as a candidate for such organs as the senate or the state president. Another permissible restriction is the 'observance of formal requirements for submitting a nomination for election, such as payment of a cost contribution or presentation of a certain number of declarations of support'.<sup>34</sup>

During the *travaux préparatoires* of the CCPR there was an attempt to widen the scope of application of the right to be elected to all organs of

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(7.2) permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;

(7.3) guarantee universal and equal suffrage to adult citizens;

(7.4) ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;

(7.5) respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;

(7.6) respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;

(7.7) ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;

(7.8) provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process;

(7.9) ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.

<sup>33</sup> M. Nowak, 1993, pp. 444-447.

<sup>34</sup> *Ibid.*, p. 447.

authority. However, the proposal 'was rejected, on the grounds that in most countries not all organs of authority were elective'.<sup>35</sup>

## 2.2 *The Human Rights Committee*

In General Comment No. 25<sup>36</sup> on Article 25 of the CCPR, the Human Rights Committee adopts the view that the right to stand for elections can be further limited than the right to vote. 'For example, it may be reasonable to require a higher age for election or appointment to particular offices than for exercising the right to vote, which should be available to every adult citizen'.<sup>37</sup> Also 'established mental incapacity may be a ground for denying a person the right . . . to hold office'.<sup>38</sup> It is admissible to require a certain number of supporters for any candidate. 'If a candidate is required to have a minimum number of supporters for nomination, that requirement should be reasonable and not act as a barrier to candidacy'.<sup>39</sup>

The Human Rights Committee goes on to define the nature of admissible restrictions. Demanding that any restriction must be based on objective criteria reinforces the requirements included in the provision itself of reasonability and non-discrimination. These principles are also applied to cases of conflict of interests and the removal of elected office holders. In this case the Human Rights Committee wants to see fair procedures incorporated in the legal provisions.

Any restrictions on the right to stand for election, such as minimum age, must be justifiable on objective and reasonable grounds. Persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as education, residence or descent, or by reason of political affiliation. No person should suffer discrimination or disadvantage of any kind because of that person's candidacy. States parties should indicate and explain the legislative provisions which exclude any group or category of persons from elective office.<sup>40</sup>

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<sup>35</sup> M. J. Bossuyt, 1987, p. 474.

<sup>36</sup> General Comment No. 25(57) concerning Article 25 of the CCPR, Report of the Human Rights Committee, Vol. I, UN doc. A/51/40, pp. 98-103.

<sup>37</sup> *Ibid.*, para. 4.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*, para. 17.

<sup>40</sup> *Ibid.*, para. 15.

The principle of non-discrimination is applied in two distinct stages. In a first stage, discrimination is to be excluded when a person wants to become a candidate. In a second stage, no discrimination should occur when a person has become a candidate.

Conditions relating to nomination dates, fees or deposits should be reasonable and not discriminatory. If there are reasonable grounds for regarding certain elective offices as incompatible with tenure of specific positions (e.g. the judiciary, high-ranking military office and public service), measures to avoid any conflicts of interest should not unduly limit the rights protected by subparagraph (b) of article 25. The grounds for the removal of elected office holders should be established by laws based on objective and reasonable criteria and incorporating fair procedures.<sup>41</sup>

Regarding the conflicts of interest, the Human Rights Committee only mentions the conflict resulting from certain positions a candidate holds in the public sector. The term conflicts of interest is also used for another situation not covered by the Committee.

During the 2001 elections in Italy a candidate having control of several enterprises and of large parts of the mass media stood successfully for election. The question is whether it should be required that a candidate should resign from posts in such companies, in order to be admitted as candidate, as it is required for public posts.

One of the reasons for the regulations concerning conflicts of interest regarding holders of public posts is that these persons dispose of unequal means to influence the voters. If one compares the potential possibilities to influence voters of holders of public posts and a person who controls large parts of the media, one cannot ignore that the latter disposes of much higher possibilities. On the other hand, there is a difference between holders of public posts and those of a certain position in the private sector. Traditionally it is seen that means to influence derive from the position one occupies inside the system of the state administration, in a broad sense. All power is exercised by the state. However, in the modern world and especially in the world of globalization, other actors, sometimes as powerful as states, are on the scene.

Much discussion can be observed on the national levels. However, it is important to distinguish the two situations: The 'classical' conflict of interests resulting from two positions in the public sector and a newer one resulting from positions in the public sector and the private sector. The rules for the first one are clear. For the public-private 'conflict of interests' different solutions have been found on national levels, but many apply to members of the

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<sup>41</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 16.

government and not generally to all candidates. In this way, the rules come into play at a later stage when the candidates are already elected.

A second reason for obliging candidates to resign from public posts because of the possible conflict of interests is to avoid the misuse of public functions for the personal benefits of a candidate. This reason does not stand in the case when conflicts of interest are a result of the private functions of a candidate. In addition, a limitation of the right to stand for elections of rich or powerful persons could amount to an inadmissible discrimination based of economic wealth.

It becomes clear that a limitation of the right to stand for elections would not be an adequate solution. However, situations, such as the one seen in Italy, must be resolved. A solution can be a strict control of the use of means of influence already in the pre-election period; that is, even before his or her election. What is needed is a control of how these economic means are used during the election campaign. The relevance of this point will be exposed in the following section on genuine elections.

In a last paragraph on the element of standing for elections of General Comment No. 25, the Human Rights Committee deals with the issue of independent candidates. It states that '[t]he right of persons to stand for election should not be limited *unreasonably* by requiring candidates to be members of parties'.<sup>42</sup> The right to stand for elections to candidates without party membership is not automatically excluded under Article 25 of the CCPR, but the Human Rights Committee admits the possibility for an exclusion of independent candidates. However, a possible exclusion must be reasonable as well. It seems difficult to think about a case when the inadmissibility of independent candidates could be reasonable, especially when one looks at the element of genuine elections. It is possible to read the position of the Human Rights Committee in this point as a preference for the admission of independent candidates without, however, imposing this preference as an absolute rule on the States Parties.

Regarding the political opinion of possible candidates, the Human Rights Committee underlines that this should not be used to limit the right to stand for elections. There is, however, the exception of parties or candidates whose aims are, according to Article 5 of the CCPR,<sup>43</sup> contrary to the rights and

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<sup>42</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 17. Emphasis added.

<sup>43</sup> Article 5 of the CCPR: '1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant. 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or

freedoms contained in the CCPR. 'Without prejudice to paragraph (1) of article 5 of the Covenant, political opinion may not be used as a ground to deprive any person of the right to stand for election'.<sup>44</sup>

Historical experience shows that it is important to exclude from the electoral process candidates or parties having a political opinion, which is according to Article 5 of the CCPR aimed at the destruction or too far-reaching limitation of the recognized rights and freedoms.<sup>45</sup> This provision functions as a self-protection of the established systems. However, a careful application is needed in this context since there is a risk of undue prohibitions of opposition parties.

In the recent case of *Antonina Ignatane v. Latvia*, the complainant is a Latvian citizen of Russian origin. According to the national law, any candidate for elections needs to pass a language test if he or she has not graduated from a school in which Latvian is the language of instruction. The complainant did pass such a test four years earlier. She was, however, subjected to a second test, in which she was considered not to have proven sufficient knowledge of the Latvian language for the purpose of standing for elections. Unlike the first test, which was assessed by five experts, the second test was conducted a few days before the elections in an ad hoc manner and assessed by one person only.

The Human Rights Committee takes up this point and makes it the central argument for the violation of Article 25 of the CCPR, applying the doctrine established in General Comment No. 25 that any restriction on the right to stand for election must be justifiable on objective and reasonable grounds. 'The annulment of the author's candidacy pursuant to a review that was not based on objective criteria and which the State party has not demonstrated to be procedurally correct is not compatible with the State party's obligations under article 25 of the Covenant'.<sup>46</sup>

The Committee also affirms in its examination of the merits of this case that Article 25 'secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned

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existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent'.

<sup>44</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 17.

<sup>45</sup> For example, the Constitution of the Republic of Weimar did not provide for such mechanisms.

<sup>46</sup> Communication No. 884/1999, *Antonina Ignatane v. Latvia*, views adopted on 25 July 2001, UN doc. CCPR/C/72/D/884/1999, para. 7.4.



in article 2, including language'.<sup>47</sup> However, it does not develop any further considerations on the admissibility of language tests for candidates and does not take up the question whether linguistic minorities should be encouraged to take part in elections rather than confronted with additional obstacles, among them, arguably, language tests. This is problematic especially in a state such as Latvia where up to 40 per cent of the population do not have the official language as the mother tongue.

In the case of *Joszef Debreczeny v. the Netherlands*, the complainant's right to take the seat in the municipal council to which he was elected was denied because of his employment as a national police sergeant, a civil servant, in the same municipality. The Human Rights Committee adopted the view that the restriction of the right to be elected was permissible.

The Committee notes that the restrictions on the right to be elected to a municipal council are regulated by law and that they are based on objective criteria, namely the electee's professional appointment by or subordination to the municipal authority. Noting the reasons invoked by the State party for these restrictions, in particular, to guarantee the democratic decision-making process by avoiding conflicts of interest, the Committee considers that the said restrictions are reasonable and compatible with the purpose of the law.<sup>48</sup>

In the case of *Peter Chiiko Bwalya v. Zambia*, the author was chairman of the People's Redemption Organization, a political party in Zambia. In 1983, at the age of 22, the author ran for a parliamentary seat in the Constituency of Chifubu, Zambia. He stated that the authorities prevented him from properly preparing his candidacy and from participating in the electoral campaign by threatening and intimidating him, and in January 1986 he was dismissed from his employment. The Ndola City Council subsequently expelled him and his family from their home, while the payment of his father's pension was suspended indefinitely. In this case, the Human Rights Committee adopted the view that:

Mr. Bwalya was detained and denied the right to run for a parliamentary seat in the Constituency of Chifubu merely on account of his membership in a political party other than that officially recognized; in this context, the Committee observes that restrictions on political activity outside the only

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<sup>47</sup> *Antonina Ignatane v. Latvia* (*loc. cit.*, note 46), para. 7.3.

<sup>48</sup> Communication No. 500/1992, *Joszef Debreczeny v. the Netherlands*, views adopted on 3 April 1995, Report of the Human Rights Committee, Vol. II, UN doc. A/50/40, pp. 59-65, at para. 9.3.

recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs.<sup>49</sup>

In the case of *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*,<sup>50</sup> the authors of the communication claim that the new laws on the residence status of foreign spouses are a breach of several provisions of the CCPR. The two Acts give the right of residence to foreign wives of Mauritian husbands but not in the inverted situation of foreign husbands of Mauritian wives. The Mauritian women who want to exercise their right to family life can do so only if they leave Mauritius. In this way they lose the possibility to enjoy their rights which requires their residence in Mauritius.

The Human Rights Committee does not find a violation of Article 25, because the case contains no information supporting that kind of conclusion. However, the Committee states in this early decision:

that restrictions established by law in various areas may prevent citizens in practice from exercising their political rights, i.e. deprive them of the opportunity to do so, in ways which might in certain circumstances be contrary to the purpose of article 25 or to the provisions of the Covenant against discrimination, for example if such interference with opportunity should infringe the principle of sexual equality.<sup>51</sup>

The Human Rights Committee holds that Article 25 demands, besides the *de jure* guarantees, also a *de facto* possibility to exercise the rights contained in Article 25. There must be an opportunity to exercise the right to participation compatible with the exercise of other human rights. In this case, one of the authors of the communication, Mrs Aumeeruddy-Cziffra, was a Member of Parliament. If the only possibility to realize her right to family life was to leave the country, then, she would not have the *de facto* opportunity to continue her functions as Member of Parliament and would not have the possibility to stand as a candidate for the following elections.

In the concluding observations on the United States state report of 1995, the Human Rights Committee expresses its concern about the practical restriction of 'the considerable financial costs that adversely affect the right of

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<sup>49</sup> Communication No. 314/1988, *Peter Chiiko Bwalya v. Zambia*, views adopted on 14 July 1993, Report of the Human Rights Committee, Vol. II, UN doc. A/48/40, pp. 52-56, at para. 6.6.

<sup>50</sup> Communication No. 35/1978, views adopted on 9 April 1981, *Human Rights Committee: Selected Decisions under the Optional Protocol* (New York: United Nations, 1985), pp. 67-71.

<sup>51</sup> *Ibid.*, para. 9.2(c)2.

persons to be candidates at elections'.<sup>52</sup> The *de facto* possibility to stand for elections is unreasonably limited to persons with certain economic means.

In the concluding observations on the state report of India, the Human Rights Committee welcomes the positive discrimination of social groups and women in elected positions. This measure does not interfere directly with the nomination process of the political parties, but with the right to be elected. If a certain number of seats are reserved, fewer seats can be disputed between the other candidates.

The Committee has noted that positions in elected bodies are reserved for members of scheduled castes and tribes and that a constitutional amendment has reserved one third of the seats in elected local bodies (Panchayati Raj) for women. The Committee also notes the introduction of a bill to reserve one third of the seats for women in the Federal Parliament and in state legislatures.<sup>53</sup>

Although discriminatory, this positive form of discrimination is admissible because it aims at increasing participation of disadvantaged groups in the society.

Regarding the reservations to Article 25 (b) made by Kuwait, which limit the right to stand for elections to males, the Human Rights Committee expresses its doubts about the admissibility of the reservations. It says that the reservations 'raise the serious issue of their compatibility with the object and purpose of the Covenant'<sup>54</sup> and demands Kuwait to 'take all the necessary steps to ensure to women the right to vote and to be elected on an equal footing with men'.<sup>55</sup> This form of discrimination is a violation of Article 2 of the CCPR, to which Article 25 of the Covenant makes reference in its first paragraph.

Concerning the distinction of reasonable and unreasonable restrictions of the right to stand for elections, the Human Rights Committee highlights the negative consequences of too restrictive conditions for the registration of candidates. It says in the concluding observations on the state report of Kyrgyzstan:

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<sup>52</sup> Report of the Human Rights Committee, Vol. I, UN doc. A/50/40, paras. 266–304, at para. 289.

<sup>53</sup> UN doc. CCPR/C/79/Add.81 (1997), para. 10.

<sup>54</sup> Report of the Human Rights Committee, Vol. I, UN doc. A/55/40, paras. 452–497, at para. 456.

<sup>55</sup> *Ibid.*, para. 461.

The Committee is concerned about the conduct of the parliamentary elections in the Kyrgyz Republic in March 2000 and in particular about the non-participation of political parties which failed to register one year prior to the elections, or the statutes of which did not explicitly declare an intention to stand for elections.<sup>56</sup>

It is true that the registration of candidates precedes the election but the time frame should be drawn in a way that links the registration process to the elections. This is not guaranteed when there is one year in-between.

### *2.3 The Committee on the Elimination of Racial Discrimination*

General Recommendation No. 20 on Article 5 of the CERD notes that the right to stand for elections is limited to citizens.<sup>57</sup>

Accepting that the right to stand for elections is not universal but limited to the citizens of the state, the Committee on the Elimination of Racial Discrimination is dealing with the issue of discrimination inside the group of citizens in a state. Ethnic minorities are often confronted with difficulties when individual members of these groups are about to make use of their right to stand for elections. In the concluding observations on the state report of Georgia, the Committee:

expresses its concern at the under-representation of ethnic minorities in Parliament. The Committee notes with concern the barriers to participation of minorities in political institutions, for instance with regard to the limitation on the participation of minorities in local executive bodies due to a lack of knowledge of the Georgian language.<sup>58</sup>

One of the reasons for the under-representation of ethnic minorities in that state is the lack of knowledge of the language. Especially for the participation on the local level, the linguistic composition of the areas concerned should be taken into consideration. Recognition of minority languages is one possible solution. In any case, adequate positive measures to overcome the problem should be adopted.

In order to encourage states to continue good practices in their politics, which aim at broader participation, including wherever possible the nomination of candidates from minority groups, the Committee on the Elimination of

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<sup>56</sup> UN doc. CCPR/CO/69/KGZ (2000), para. 23.

<sup>57</sup> General Recommendation No. 20(48), Report of the Committee on the Elimination of Racial Discrimination, UN doc. A/51/18, p. 124, at para. 3.

<sup>58</sup> UN doc. CERD/C/304/Add.120 (2001), para. 13.

Racial Discrimination refers to the positive aspects in some states. For example, in the concluding observations on the state report of Greece, the Committee notes positively 'the information provided by the State party according to which members of minority groups participate in the political life of the country at the national and municipal levels'.<sup>59</sup> In the concluding observations on the state report of the United Kingdom, the Committee notes positively '[t]he various measures taken to increase the participation of members of ethnic minorities in public and government office'.<sup>60</sup> Generally, the Committee is in favour of positive measures that increase the participation of members of minority groups.

Citizenship is a requirement explicitly contained in Article 5 of the CERD. But so is the principle of universal suffrage. This co-existing means that citizenship is a requirement which should be dealt with carefully. Regarding citizenship as a condition to be entitled to stand for elections, the Committee on the Elimination of Racial Discrimination is 'concerned by the fact that, in spite of efforts, the Government of Kuwait has not until now found a solution to the problems of bidoons, the majority of whom are still stateless'.<sup>61</sup> The same sort of problem is noticed in the Syrian Arab Republic. The Committee 'is still concerned about the stateless status of a large number of persons of Kurdish origin'.<sup>62</sup> The lack of recognized citizenship means that these groups do not have the right to stand for elections. Regarding Croatia the Committee does not explicitly mention citizenship as a condition for the enjoyment of political rights, but one can extend the concerns expressed about the slow process of naturalization also to the right to stand for elections. The Committee is 'concerned at the excessive delays in the processing of applications for citizenship, in particular those of ethnic Serbs, which have resulted in applicants losing social and educational benefits'.<sup>63</sup> Also in Latvia the naturalization and therefore the right to stand for elections is problematic. '[M]ore than 25 per cent of the resident population, many of them belonging to non-Latvian ethnic groups, have to apply [for citizenship] and are in a discriminatory position'.<sup>64</sup> It is clear that for the Committee on the Elimination

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<sup>59</sup> UN doc. CERD/C/304/Add.119 (2001), para. 9.

<sup>60</sup> UN doc. CERD/C/304/Add.20 (1997), para. 6.

<sup>61</sup> UN doc. CERD/C/304/Add.72 (1999), para. 12.

<sup>62</sup> UN doc. CERD/C/304/Add.70 (1999), para. 9.

<sup>63</sup> UN doc. CERD/C/304/Add.55 (1999), para. 11.

<sup>64</sup> Report of the Committee on the Elimination of Racial Discrimination, UN doc. A/54/18, paras. 384-414, at para. 395.

of Racial Discrimination citizenship is not only a formal requirement to be entitled to stand for election. It must be questioned who is considered citizen of a state, and the conditions for granting citizenship need to be analysed.

The Committee on the Elimination of Racial Discrimination also highlights positive examples. In the case of the Czech Republic, it 'welcomes the additional amendments to the Act (194/1999) on the Acquisition and Loss of Citizenship (September 1999), which has helped to resolve problems relating to the acquisition of Czech citizenship for former citizens of the Czech and Slovak Federal Republic'.<sup>65</sup> These measures will help to extend the right to stand for elections to a larger part of the inhabitants of that country.

Another argument for the respect of the right of every citizen to stand for elections, besides the legal obligation assumed by the state itself, is that broad participation in public life, including standing for elections, of all different groups in society increases the internal stability of a state. In India, the object of the Committee's concern is 'the denial of the equal enjoyment of political rights, as provided for in article 5 (c) of the Convention, [that] has led to an increase of violence, in particular in Jammu and Kashmir'.<sup>66</sup> But broad participation must also be encouraged and should not be hampered by any organization. With regard to Belarus, the Committee approves the legislation 'which prohibits the establishment and activities of [political] parties whose aim is to carry out propaganda for national, religious or racial enmity'.<sup>67</sup>

Participation in elections (as a candidate) is one point the Committee on the Elimination of Racial Discrimination emphasizes in regard to ethnic minorities. Behind the concerns of the Committee might not only be the full implementation of the right contained in Article 5 of the CERD, but also the general perception that political rights are a key for the realization of (all) other human rights. This might play a role when the Committee considers the state reports. In the concluding observations on the state report of Panama, the Committee notices 'with regret that indigenous people have a low rate of participation in elections'.<sup>68</sup> But again the Committee highlights a positive case and welcomes '[t]he direct participation in national elections, for the first time since Pakistan's independence, of the inhabitants of the Tribal Areas'.<sup>69</sup> It welcomes as well the appointment of the General Commission on Swedish

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<sup>65</sup> UN doc. CERD/C/304/Add.109 (2001), para. 3.

<sup>66</sup> UN doc. CERD/C/304/Add.13 (1996), para. 22.

<sup>67</sup> UN doc. CERD/C/304/Add.22 (1997), para. 9.

<sup>68</sup> UN doc. CERD/C/304/Add.32 (1997), para.15.

<sup>69</sup> UN doc. CERD/C/304/Add.25 (1997), para. 9.

Local Democracy to encourage broader participation in local government of people with immigrant backgrounds.<sup>70</sup>

Discrimination against certain groups of citizens in general extends often to political rights as well. Concerning Brazil, the Committee on the Elimination of Racial Discrimination notices that generally 'discriminatory attitudes towards the indigenous, black and mestizo populations persist within Brazilian society and are apparent at a number of levels in the political, economic and social life of the country. These discriminatory attitudes concern, *inter alia*, . . . political participation'.<sup>71</sup> These groups are facing a double impact when, as in the case of Brazil, general discrimination is combined with a limitation of the right to stand for elections to literate persons. 'The fact that illiterate citizens, who are found especially among the indigenous, black or mestizo population, or other vulnerable groups, cannot be elected in political elections is contrary to the spirit of article 5 (c) of the Convention'.<sup>72</sup>

However, the problem would not be solved with the full implementation of the right to education for all. The limitation of the right to stand for elections itself is the concern of the Committee.

#### 2.4 *The Committee on the Elimination of Discrimination against Women*

In General Recommendation No. 23 on political and public life,<sup>73</sup> the Committee on the Elimination of Discrimination against Women leaves no doubt regarding Article 7(a). Equal rights for women regarding elections are to be guaranteed in the legal provisions of the States Parties (*de jure*) as well as fully implemented (*de facto*).

The Convention [CEDAW] obliges States parties in constitutions or legislation to take appropriate steps to ensure that women, on the basis of equality with men, enjoy the right to vote in all elections and referendums, and to be elected. These rights must be enjoyed both *de jure* and *de facto*.<sup>74</sup>

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<sup>70</sup> Report of the Committee on the Elimination of Racial Discrimination, UN doc. A/55/18, paras. 326–345, at para. 330.

<sup>71</sup> UN doc. CERD/C/304/Add.11 (1996), para. 10.

<sup>72</sup> *Ibid.*, para. 13.

<sup>73</sup> General Recommendation No. 23, Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/52/38/Rev.1, pp. 61–71.

<sup>74</sup> *Ibid.*, para. 18.

The Committee on the Elimination of Discrimination against Women is aware of the difficulties that female candidates face. As obstacles to women's standing as candidates the Committee points at factors stemming from the legal side, from society or the electorate and from women themselves.

[F]actors that in some countries inhibit women's involvement in the public or political lives of their communities include restrictions on their freedom of movement or right to participate, prevailing negative attitudes towards women's political participation, or a lack of confidence in and support for female candidates by the electorate. In addition, some women consider involvement in politics to be distasteful and avoid participation in political campaigns.<sup>75</sup>

It goes on by pointing to the responsibility of political parties to ensure equal possibilities for women to be included in the lists of candidates: 'Political parties must embrace the principles of equal opportunity and democracy and endeavour to balance the number of male and female candidates'.<sup>76</sup> The Committee demands the adoption of quota regulations.

This approach of the Committee on the Elimination of Discrimination against Women is rather far-reaching. Political parties are not party to the CEDAW and are not under obligations of the CEDAW. But the Committee, in the final part of General Recommendation No. 23, adopts recommendations, which put the burden of implementation on the States Parties.

States parties are under an obligation to take all appropriate measures, including the enactment of appropriate legislation that complies with their Constitution, to ensure that organizations such as political parties . . . which may not be subject directly to obligations under the Convention, do not discriminate against women and respect the principles contained in articles 7 and 8.<sup>77</sup>

Article 4(1) of the CEDAW stipulates that special temporary measures aimed at the accelerating of the *de facto* equality between men and women shall not be considered discriminatory against men. In regard to equal possibilities to stand for elections, the Committee on the Elimination of Discrimination against Women deals with quota regulations for female candidates in its concluding observations, for example in the case of Burkina Faso. The Committee 'recommends that the State party implement temporary special measures . . .

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<sup>75</sup> General Recommendation No. 23 (*loc. cit.*, note 73), para. 20(d).

<sup>76</sup> *Ibid.*, para. 22.

<sup>77</sup> *Ibid.*, para. 42.



and use a quota system in order to achieve a substantial improvement in the number of women in Parliament and increase their participation in political life and decision-making'.<sup>78</sup>

In the concluding observations on the state report of Iraq, the Committee takes up the point of quota regulations inside political parties in order to increase the number of women candidates for elected positions. Nonetheless, it is still concerned with the *de facto* situation of low representation of women. 'While noting that, apparently, there is a quota provision in place in the country's main political party, the Ba'ath Party, to increase the number of women in leadership positions, the Committee expresses its concern about the continuing low representation of women in public life'.<sup>79</sup>

Regarding the state report of Austria, the Committee 'is concerned at the decrease in women's representation in the legislature of the recent elections'.<sup>80</sup> Besides the positive discrimination under Article 4(1) of the CEDAW, there is also the possibility for the state to increase female participation by other 'appropriate measures' (Article 7(1) of the CEDAW). For the state under consideration, the Committee recommends the adoption of financial incentives in order to raise the number of female candidates in elections.

The Committee recommends that the Government . . . consider, inter alia, the use of federal funding for political parties as an incentive for the increased representation of women in Parliament, as well as the application of quotas and numerical goals and measurable targets aimed at increasing women's political participation.<sup>81</sup>

In its concluding observations on the state report of Peru, the Committee goes one step further and wants to see how the quota regulation helps to increase the number of female candidates *de facto*. 'The Committee requests that the next report contain the results of the steps taken to increase the access of women to Parliament through the requirement of a 25 per cent quota for women in the lists of candidates'.<sup>82</sup>

The Committee on the Elimination of Discrimination against Women considers in its concluding observations on the state report of Belarus the *de*

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<sup>78</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/55/38, Part I, paras. 239–286, at para. 273.

<sup>79</sup> *Ibid.*, Part II, paras. 166–210, at para. 195.

<sup>80</sup> *Ibid.*, Part II, paras. 211–243, at para. 238.

<sup>81</sup> *Ibid.*

<sup>82</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/53/38/Rev.1, Part II, paras. 292–346, at para. 322.

*facto* obstacles, which prevent women from becoming candidates in elections. These obstacles are often more difficult to overcome than the *de jure* obstacles. The implementation of laws *de facto* requires an ongoing effort.

The Committee is concerned that the absence of an enabling environment in the country prevents women from fully participating in all aspects of public life in accordance with articles 3, 7 and 8 of the Convention. The Committee is in particular concerned at the small number of women holding political and decision-making positions.<sup>83</sup>

Positive measures to increase the *de facto* participation of women can have different forms. In its concluding observations on the state report of Panama, the Committee 'recommends training programmes for women political leaders and encourages the large-scale participation of women in democratic activities and decision-making'.<sup>84</sup>

Pure and simple discrimination against women is subject to criticism by the Committee on the Elimination of Discrimination against Women. Considering the state report of Maldives, the Committee addresses the reservation made regarding Article 7(a), which should prevent the Committee from considering the obstacle for women to stand for presidential election in this country. 'It is concerned that the reservation . . . supports the retention of legislative provisions that exclude women from the office of President and Vice-President of the country'.<sup>85</sup> This represents a *de jure* discrimination against women, which is in a way the first obstacle to overcome. Legal provisions alone, however, do not ensure the right to stand for elections, as the Committee has pointed out.

## 2.5 The Commission on Human Rights

In his final report on the situation of human rights in the Islamic Republic of Iran, the Special Representative of the Commission on Human Rights, Reynaldo Galindo Pohl, refers to information that he received on the lack of transparency in decisions on the admissibility of candidates for the parliamentary elections. However, Pohl does not express any specific opinion on the matter.

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<sup>83</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/55/38, Part I, paras. 334–378, at para. 355.

<sup>84</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/53/38/Rev.1, Part II, paras. 175–205, at para. 202.

<sup>85</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/56/38, Part I, paras. 114–146, at para. 130.

It was further reported that the qualifications of 39 former Majlis deputies were not confirmed by the screening committees of the Guardians Council. Among those disqualified were reportedly six *ulema*. The applications of one third of the over 3,000 candidates were turned down, according to the newspaper *Salam* of 8 April 1992.

The former Heavy Industries Minister, Mr. Behzad Nabavi, in an open letter, demanded that the Council publish the reasons for his rejection in the press. Hojjatolislam Sadeq Khalkhali stated that he did not know why he was disqualified. According to *Salam* of 8 April 1992, he said: 'We have repeatedly told the Guardians Council to publicly state our offences, but so far no one has told us anything and we have not been asked for a question and answer session. If we are treated in such a manner, think what will happen to others'.<sup>86</sup>

Any decision on a disqualification must be motivated. There should be a possibility to verify the reasonableness of the limitation of the right to stand for elections. In addition, it is necessary to communicate the motivation of a disqualification in order to allow the person concerned to remove any obstacle for his or her candidacy. The inclusion of this information in the report shows that the situation is troublesome and not in accordance with human rights standards applied by UN bodies.

## 2.6 *The Inter-American Commission on Human Rights*<sup>87</sup>

In the case of *Estiverne v. Haiti*,<sup>88</sup> the complainant who planned to stand for the presidential elections was refused to enter the country. Returning to Haiti was necessary in order to regain Haitian nationality. The Inter-American Commission on Human Rights decided that there was, among others, a violation of Article 23 of the ACHR. The argument of the Commission in this case is that the entry was denied in view of the complainant's plans to regain nationality for the purpose to stand as a candidate in the presidential election.

In the case of *Alvaro José Robelo González v. Nicaragua*,<sup>89</sup> the complainant was disqualified to stand for the presidential elections because he previously

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<sup>86</sup> UN doc. E/CN.4/1993/41, paras. 190 and 191.

<sup>87</sup> Due to the wording of Article 23(2) of the ACHR, which allows restriction of the right to stand for elections based on education as well as language, the Inter-American Commission and Court of Human Rights might decide differently in cases such as the case of Brazil in the Committee on the Elimination of Racial Discrimination in section 2.3 of this study; and the case of the Kyrgyz Republic and the ODIHR in section 2.8 of this study.

<sup>88</sup> Case 9855, 24 March 1988, *Inter-American Yearbook on Human Rights 1988* (Dordrecht: Martinus Nijhoff Publishers, 1991), pp. 244–256.

<sup>89</sup> Report No. 25/01, Case 12.144, 5 March 2001. Available at: <http://www.oas.org/>.

lost his Nicaraguan nationality after acquiring Italian nationality. The Inter-American Commission on Human Rights considered the application extemporaneous and therefore inadmissible. However, the Commission came to the conclusion that the loss of citizenship was lawful. The complainant is considered a foreign national and would not have the right to stand for elections.

The two cases show how important it is to look at the conditions on how citizenship is granted. In these cases, the regulations on the acquisition of citizenship were directed against individual persons to prevent them from standing for elections.

In the case of *Susana Higuchi Miyagawa v. Peru*,<sup>90</sup> the Inter-American Commission on Human Rights considers the decision of the electoral authorities of Peru not to admit the list of candidates of the complainant's party after having already published the list in the official gazette. However, the Commission is more concerned with the accurate application of the Peruvian law and not with the development of international law on the right to stand for elections.

The case of *María Merciadri de Morini v. Argentina*<sup>91</sup> was declared admissible by the Inter-American Commission on Human Rights. In this case, the complainant holds that the disrespect for the quota regulation in Argentina 'was restricting and undermining the consequent right of voters to ensure men and women true equality of opportunities for holding elected office'.<sup>92</sup> The argument is turning the issue of quota regulations around, by saying that the right of voters to vote for a list of candidates that include women in the proportions stipulated in the Argentinean law was violated and that the voters have been prevented from having the possibility to choose female candidates. It means that there have not been alternative candidates representing a large part of the population. This is an interesting argument. The merits on the case are to be seen when the case is decided.

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<sup>90</sup> Report No. 119/99, Case 11.428, *Annual Report of the Inter-American Commission on Human Rights 1999*, Vol. II (Washington, D.C.: General Secretariat, Organization of American States, 2000), pp. 1262-1282.

<sup>91</sup> Report No. 102/99, Case 11.307, *Annual Report of the Inter-American Commission on Human Rights 1999*, Vol. I (Washington, D.C.: General Secretariat, Organization of American States, 2000), pp. 69-75.

<sup>92</sup> *Ibid.*, para. 7.

## 2.7 The European Court of Human Rights

In the case of *Gitonas and Others v. Greece*,<sup>93</sup> the complainants were civil servants or members of staff of public-law entities and public undertakings. Under Greek law, these persons are precluded from standing for elections and from being elected in any constituency where they have performed their duties for more than three months in the three years preceding the elections. These are the Greek regulations for conflicts of interest. The complainants were disqualified to stand for elections based on these Greek provisions. The European Commission of Human Rights held that there was a violation of Article 3 of Protocol No. 1 to the ECHR because the legal system for disqualification of candidates was said to be incoherent. The Commission elaborates:

The incumbents of posts in public office that were far more important than those occupied by the applicants—such as ministers, mayors or several other high-ranking civil servants—and which gave much more scope for influencing the electorate, were not subject to the restrictions set out in that paragraph. Secondly, no account was taken of the exact period—which in addition was very short—when the position giving rise to disqualification had been held during the three years preceding the elections.<sup>94</sup>

However, the European Court of Human Rights did not agree with the Commission and decided that there was no violation of Article 3 of Protocol No. 1. The Court states that Article 3 of Protocol No. 1 ‘implies subjective rights to vote and to stand for election. As important as those rights are, they are not, however, absolute’.<sup>95</sup> Furthermore, it argues that the States Parties dispose of a wide margin of appreciation in defining the conditions limiting the right to stand for elections. In this case, the Court held that its main role is to guarantee the core content of the right.

[The Court] has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate.<sup>96</sup>

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<sup>93</sup> Judgment of 1 July 1997, European Court of Human Rights; *Reports of Judgments and Decisions* 1997-IV, pp. 1218-1247.

<sup>94</sup> *Ibid.*, para. 38.

<sup>95</sup> *Ibid.*, para. 39.

<sup>96</sup> *Ibid.*

The position of the European Court of Human Rights is cautious when referring to the historical and political factors peculiar to each state. However, it establishes the reasoning behind the restrictions for civil servants to stand for elections resulting from the conflict of interests.

[D]isqualification . . . serves a dual purpose that is essential for the proper functioning and upholding of democratic regimes, namely ensuring that candidates of different political persuasions enjoy equal means of influence (since holders of public office may on occasion have an unfair advantage over other candidates) and protecting the electorate from pressure from such officials who, because of their position, are called upon to take many—and sometimes important—decisions and enjoy substantial prestige in the eyes of the ordinary citizen, whose choice of candidate might be influenced.<sup>97</sup>

In the case of *Ahmed and Others v. the United Kingdom*,<sup>98</sup> the complainants objected to the Act that precluded persons holding a politically restricted post from standing for elections. But the European Court of Human Rights maintained its views on Article 3 of Protocol No. 1 and came to the judgment that there was no violation of the right to stand for elections. It concluded its argument stating that ‘any of the applicants wishing to run for elected office is at liberty to resign from his post’.<sup>99</sup>

## 2.8 The Office for Democratic Institutions and Human Rights

In the final report on the local government elections of Albania, the ODIHR states that the formalities for the registration of candidates were impeding a smooth process. The requirements might not be reasonable if they in practical terms almost limit the right to stand for elections. The ODIHR reports that: ‘Mayoral candidates experienced the greatest difficulties, as each nomination had to be signed by the *national* party chairman, a time consuming process, especially for mayors of small and remote communes’.<sup>100</sup>

In the final report on the technical assessment mission for the parliamentary elections in Belarus, the ODIHR recommends how the registration process of candidates could be improved.

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<sup>97</sup> *Gitonas and Others v. Greece* (*loc. cit.*, note 93), para. 40.

<sup>98</sup> Judgment of 2 September 1998, European Court of Human Rights, *Reports of Judgments and Decisions* 1998-VI, pp. 2357–2410.

<sup>99</sup> *Ibid.*, para. 75.

<sup>100</sup> Republic of Albania, Local Government Elections, 1 and 15 October 2000, Final Report, Chapter V, E. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).

The candidate registration process should be more inclusive. A reasonable deposit (e.g. 50 times the minimum wage) could be introduced, refundable upon achievement of a reasonable percentage of the valid votes. Article 61 and all related provisions regarding signature requirements for candidate registration should be amended—a fixed number of valid signatures should be required to accept a candidate's registration.<sup>101</sup>

The ODIHR takes up the problem of conflict of interests when holding a public office and standing for elections in the final report on the parliamentary elections in Albania. The existing provisions on this issue were not followed, which can seriously affect the election process also in regard to its genuineness.

A more serious issue raised by observers was that according to Article 19 of the Election Law, some persons including heads of organs dealing with public order and the National Information Service must leave their jobs 25 days before the election day if they are registered as candidates for parliament. Persons subject to this article were still active in their capacities throughout the election process despite the fact they were running as candidates.<sup>102</sup>

In the final report on the presidential elections in the Kyrgyz Republic, the ODIHR reports that unfair conditions were established for the registration of candidates, hampering the right to stand for elections. 'The imposition of an onerous language test represented an unfair obstacle to participation for many candidates'.<sup>103</sup> In cases like this, it must be established if this language test was a reasonable requirement to admit persons to stand for elections. It is, of course, an advantage to speak the official language, but if this is not the case or not entirely, then the disadvantages are mainly with the candidate himself or herself. Therefore, if the candidate thinks he or she is able to stand for elections it is not reasonable to exclude him or her from doing so.

Regarding female candidates the ODIHR states, in its final report on Serbia, that the 'Party leadership and election officials remain generally unaware of the issue of women's representation and of the drastic effects of

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<sup>101</sup> Belarus, Parliamentary Elections, 15 and 29 October 2000, Technical Assessment Mission, Final Report, p. 15. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).

<sup>102</sup> Republic of Albania, Parliamentary Elections, 26 May and 2 June 1996, Chapter II.v. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).

<sup>103</sup> Kyrgyz Republic, Presidential Elections, 29 October 2000, Final Report, Chapter VI, at p. 5. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).

transition on women's economic and social status'.<sup>104</sup> ODIHR experience in Romania shows that:

The parties' central and local committees are all predominantly male bodies. Only one party (UMDR) has attempted to introduce transparent and democratic procedures for the nomination of candidates, by holding primaries. Evidence shows that when candidate selection procedures are more transparent and democratic, women have a greater chance of being selected.<sup>105</sup>

However, an improvement of the selection process might not be sufficient to raise the number of female candidates. The ODIHR does not state whether there should be a quota regulation.

### 3. GENUINE ELECTIONS

#### 3.1 Background

The meaning of genuine elections is not self-evident. This element of Article 25 of the CCPR has a close connection to the other elements. During the *travaux préparatoires* this point was discussed:

It was held by some delegations that the idea of 'guaranteeing the free expression of the will of the electors' should be given prominence and that that clause should therefore be placed immediately after the words 'genuine periodic elections'. Other held that 'genuine periodic elections', 'universal and equal suffrage' and 'secret ballot' were the elements of genuine elections, which in turn guaranteed the free expression of the will of the electors. These elements should therefore remain grouped together.<sup>106</sup>

However, genuine elections and the free expression of the will of the electors are interrelated and the words 'genuine' and 'free' are both used to determine the same content. The most important guarantee for genuine elections is the secret vote; this element is dealt with in section 5 of this study. Nonetheless, 'the free expression of voter will relates not simply to the time of balloting, but

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<sup>104</sup> Republic of Serbia/Federal Republic of Yugoslavia, Parliamentary Elections, 23 December 2000, Final Report, Chapter V, C, at p. 8. Available at: [http://www.osce.org/odihhr/documents/reports/election\\_reports/](http://www.osce.org/odihhr/documents/reports/election_reports/).

<sup>105</sup> Romania, Presidential and Parliamentary Elections, 26 November and 10 December 2000, Chapter V, D, 2, at p. 10. Available at: [http://www.osce.org/odihhr/documents/reports/election\\_reports/](http://www.osce.org/odihhr/documents/reports/election_reports/).

<sup>106</sup> M. J. Bossuyt, 1987, p. 475.



rather protects voters even before the election in forming their opinion independently and free of compulsion or manipulative influence by the State or private parties'.<sup>107</sup> This implies that other freedoms, such as freedom of expression, association and assembly, are closely related to genuine elections because they act as facilitators. '[T]he right of eligible voters not to be pressured or impermissibly influenced in forming . . . their will and the right of campaigning parties and candidates to unimpaired campaign advertising'<sup>108</sup> are to be guaranteed. So there must be a campaign and public debate and these must be conducted in a balanced way.

The requirement of an effective choice between different political alternatives did give rise to the question of whether one-party systems are excluded from guaranteeing genuine elections. The answer given by Nowak is negative: one-party systems are admissible under Article 25 of the CCPR 'when the structures within the party are pluralistic and when the party represents a broad spectrum of the population'.<sup>109</sup> However, this view is controversial and reflects a formal understanding of Article 25 of the CCPR.

### 3.2 *The Human Rights Committee*

In its General Comment No. 25, the Human Rights Committee affirms the principle of free choice between different candidates and adequate environment as essential for the element of genuine elections:

Persons entitled to vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind.<sup>110</sup>

The Human Rights Committee refers not only to the time before or during the elections. This freedom must be guaranteed permanently, which can be read from the expression 'free to support and to oppose government'. The government of a state is a permanent institution. This is one more point supporting the view that Article 25 contains a continuous right. In another

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<sup>107</sup> M. Nowak, 1993, p. 449.

<sup>108</sup> *Ibid.*, p. 450.

<sup>109</sup> *Ibid.*, p. 444.

<sup>110</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 19.

paragraph the Human Rights Committee states that '[f]reedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected'.<sup>111</sup> This is a further indication that the freedoms relate to the electoral process.

Regarding the campaign as the principal means to influence voters the Human Rights Committee states that restrictions on the amount of money spent in favour of a candidate are necessary to ensure a balanced campaign, which does not influence the voter in a one-sided way. If in practical terms only one candidate or party were visible to the voter, he or she would not have the knowledge of other candidates and does, therefore, not have a real choice between different candidates.

Reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.<sup>112</sup>

Freedom of expression,<sup>113</sup> assembly and association are essential to the fulfilment of the right to genuine elections because they guarantee the establishment of political parties and the exchange or transmission of political programmes or ideas via the media, through leaflets or in meetings and demonstrations. The Human Rights Committee enumerates in detail what is needed to guarantee these freedoms. Freedom of expression and assembly are that important because it is through these freedoms that the public debate takes place, which in turn gives voters the possibility to make an informed choice between the candidates on election day and to observe and to participate in discussions on public issues constantly.

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

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<sup>111</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 12.

<sup>112</sup> *Ibid.*, para. 19.

<sup>113</sup> On freedom of expression, see General Comment No. 10(19), Report of the Human Rights Committee, UN doc. A/38/40, pp. 109-110.

to publish political material, to campaign for election and to advertise political ideas.<sup>114</sup>

Also freedom of association serves the public debate. Political parties can serve as a channel where issues are discussed and taken afterwards to the broader public. They facilitate in this way the expression of ideas and opinions. For this reason it is crucial that political parties fully embrace and apply in their internal structures the fundamental rights and principles contained in Article 25. It would not serve the free public debate if political parties suffocate internally opinions or ideas.

The right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. Political parties and membership in parties play a significant role in the conduct of public affairs and the election process. States should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.<sup>115</sup>

For the question of the admissibility of a one-party system the Human Rights Committee states in General Comment No. 25: 'The right of persons to stand for election should not be limited unreasonably by requiring candidates to be members . . . of *specific parties*'.<sup>116</sup> One can conclude that this is directed against one-party systems, which do not allow an alternative of candidates who are not members of the official party.<sup>117</sup>

In the case of *Peter Chiiko Bwalya v. Zambia*, the Human Rights Committee holds that a one-party system is an unreasonable restriction to Article 25 of the CCPR. '[T]he Committee observes that restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs'.<sup>118</sup> However, the Committee deals with the issue under Article 25(a), avoiding in this way a clear statement about the admissibility of such a system under the requirement of genuine elections.

Nonetheless, regarding again the question of a one-party system in Zambia, the Human Rights Committee expresses its preference in the

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<sup>114</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 25.

<sup>115</sup> *Ibid.*, para. 26.

<sup>116</sup> *Ibid.*, para. 17. Emphasis added.

<sup>117</sup> See G. H. Fox, 2000, p. 59.

<sup>118</sup> *Peter Chiiko Bwalya v. Zambia* (*loc. cit.*, note 49), para. 6.6.

concluding observations on the report of this state. 'The Committee welcomes the introduction of a multi-party system of government as well as efforts undertaken by the State party to strengthen democratic institutions and the multi-party system'.<sup>119</sup>

The Human Rights Committee takes up the issue on freedom of expression in its concluding observations on the state report of Armenia,<sup>120</sup> making a clear link between the two provisions of the CCPR. Freedom of expression does include also new forms of communication and a free press. Both the free press and the free media are essential for a balanced campaign.

The Committee expresses its concern about the strict governmental control over electronic media, which may raise issues under article 19 and which results in serious limitations to the exercise of the rights guaranteed in article 25, in particular with regard to elections.<sup>121</sup>

The Human Rights Committee, in its concluding observations on the state report of Kyrgyzstan, stresses again the importance of the freedom of the media as one of the requisites for the successful implementation of Article 25 of the CCPR.

The Committee expresses its concern about the closing of newspapers on charges of tax evasion and in order to secure the payment of fines. It is also concerned about the functions of the National Communications Agency, which is attached to the Ministry of Justice and has wholly discretionary power to grant or deny licences to radio and television broadcasters. Delay in the granting of licences and the denial of licences have a negative impact on the exercise of freedom of expression and the press guaranteed under article 19 and result in serious limitations in the exercise of political rights prescribed in article 25, in particular with regard to fair elections.<sup>122</sup>

Limitations of the freedom of expression can be disguised by various reasons, in the Kyrgyzstan case by administrative procedures. The administration might be not well functioning in general in a state but in regard to the functioning of newspapers, the media or the work of journalists, this cannot be used as an excuse since the free public debate is at risk.

Regarding the state report of Italy in 1994, the Human Rights Committee expressed its concern 'about the excessive concentration of control of the mass

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<sup>119</sup> UN doc. CCPR/C/79/Add.62 (1996), para. 5.

<sup>120</sup> UN doc. CCPR/C/79/Add.100 (1998).

<sup>121</sup> *Ibid.*, para. 21.

<sup>122</sup> UN doc. CCPR/CO/69/KGZ (2000), para. 21.

media in a small group of people. Furthermore, it notes that such concentration may affect the enjoyment of the right to freedom of expression and information under article 19 of the Covenant'.<sup>123</sup> Since the interdependence of genuine elections and freedom of expression has been stressed by the Human Rights Committee in other cases, one might speculate about a possible position of the Committee regarding this case. A criticism of this situation can be assumed.

Furthermore, one must admit that the control of the campaign finances, highlighted by the Human Rights Committee in its General Comment No. 25, is much more complex and difficult, especially the calculation of air time used by the candidate-owner of the TV stations.

### *3.3 The Committee on the Elimination of Racial Discrimination*

General Recommendation No. 20 refers to the content of state obligations relative to Article 5 of the CERD. It states that 'protection may be achieved in different ways, be it by the use of public institutions or through the activities of private institutions. In any case, it is the obligation of the State Party concerned to ensure the effective implementation of the Convention'.<sup>124</sup> In other words, states are under a direct obligation, when acting through public institutions. And they must ensure that private entities are not violating human rights obligations. This is particularly important for the public debate, which must take place in an environment free of pressure and intimidation, and is conducted by private entities such as the media and political parties.

In this regard the Committee on the Elimination of Racial Discrimination makes the remark in its concluding observations on the state report of Iran that 'several of the civil and political rights listed in article 5 (d) of the Convention, such as . . . the freedom of opinion and expression, are enjoyed subject to certain restrictions'.<sup>125</sup> However, the Committee does not dispose of sufficient information to form its opinion on the matter.

### *3.4 The Committee on the Elimination of Discrimination against Women*

In its General Recommendation No. 23, the Committee on the Elimination of Discrimination against Women identifies the factors impeding the implementation of Article 7(a) of the CEDAW regarding the genuineness of elections:

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<sup>123</sup> Report of the Human Rights Committee, Vol. I, UN doc. A/49/40, paras. 271–290, at para. 280.

<sup>124</sup> General Recommendation No. 20 (*loc. cit.*, note 57), para. 5.

<sup>125</sup> UN doc. CERD/C/304/Add.83 (2001), para. 11.

Women frequently have less access than men to information about candidates and about party political platforms and voting procedures, information which Governments and political parties have failed to provide . . .

Women's double burden of work, as well as financial constraints, will limit women's time or opportunity to follow electoral campaigns and to have the full freedom to exercise their vote.<sup>126</sup>

The lack of access to information implies also that women are not aware of candidates who include in their programme issues which are directed to improve the situation of women. These candidates have fewer possibilities to be elected.

In its concluding observations on the state report of Belarus, the Committee on the Elimination of Discrimination against Women urges the government to improve the general conditions in order to give women the *de facto* opportunity to full participation in public life, including public debate as one component of genuine elections. The Committee recommends:

that the Government take all necessary steps to ensure an open and enabling environment where women have equal opportunity to express their opinions and to participate equally in all aspects of the political process and in civil society organizations. The Committee notes that such an environment is necessary for the advancement of women and the full implementation of the Convention.<sup>127</sup>

In its concluding observations on the state report of Croatia, the Committee on the Elimination of Discrimination against Women affirms its view expressed in General Recommendation No. 23 that the state has obligations to adopt the necessary measures to increase women's participation in all aspects of public life. The state cannot completely discharge its responsibility to women themselves. The Committee 'remains very concerned about the view expressed in the State party's report that women themselves bear full responsibility for their low level of participation in public life'.<sup>128</sup> Participation in public life as a broad concept requires presence and visibility of women in all domains. Public life includes also the participation in a public debate during the electoral process and, as this is a cycle, the participation must be permanent.

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<sup>126</sup> General Recommendation No. 23 (*loc. cit.*, note 73), paras. 20(a) and (b).

<sup>127</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/55/38, Part I, paras. 334-378, at para. 356.

<sup>128</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/53/38/Rev.1, Part I, paras. 80-119, at para. 102.

### 3.5 *The Commission on Human Rights*

The Special Rapporteur of the Commission on Human Rights for the former Yugoslavia came to the conclusion in her periodic report that in Bosnia and Herzegovina there were no conditions to hold genuine elections in 1996. The reasons indicated for this are, among others, the violations of the freedom of association, assembly, movement and expression:

[C]onditions in Bosnia and Herzegovina are not conducive at the present time to the democratic operation of the electoral process. In both entities there are violations of the rights of freedom of association and assembly, and freedom of movement for campaigners and candidates, restrictions on freedom of expression and abuses of the media, and violent attacks on politicians and their supporters.<sup>129</sup>

In this report it is visible that different expressions are used to describe what is meant by genuine elections in Article 25. The Special Rapporteur uses the term 'free and fair'<sup>130</sup> and 'democratic operations of the electoral process'. Out of the context one can determine that all these terms have the same content. The linguistic variety is, however, not of any help when defining the international standards around elections.

In his report on the human rights situation in the Republic of Equatorial Guinea, the Special Rapporteur generally considers the municipal elections held on 17 September 1995 'crucial for the process of transition to democracy in Equatorial Guinea and . . . that major progress has been made'.<sup>131</sup> As to the pre-election period, he identifies violations of the freedom of assembly which are incompatible with the concept of genuine elections.

[D]uring the campaign leading up to the municipal elections . . . it could be observed that unacceptable restrictions on their implementation continued in practice, particularly on the mainland where the government representatives (for example, of Mbini and Kogo) allowed the political parties to meet their councillor candidates only (not more than 10 in number), and refused them the right to meet voters and explain their programmes.<sup>132</sup>

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<sup>129</sup> UN doc. E/CN.4/1997/5, para. 33.

<sup>130</sup> *Ibid.*

<sup>131</sup> UN doc. E/CN.4/1996/67, para. 69.

<sup>132</sup> *Ibid.*, para. 47.

The Special Rapporteur documents acts of violence against opposition candidates and their supporters after election day.<sup>133</sup> If one understands Article 25 of the CCPR as an ongoing process, it is clear that the experience of violence in the post-elections period will affect the climate of the whole process. People would not feel free to become involved in elections any more. The genuineness of the subsequent elections is affected.<sup>134</sup>

In fact, during the 1999 elections, irregularities continued to affect the genuineness of the electoral process by not permitting opposition party freedom of movement and by general intimidation by armed forces. 'The continued presence of roadblocks manned by soldiers all over the country . . . prevented the normal conduct of the opposition parties' election campaigns'.<sup>135</sup>

### *3.6 The Inter-American Court of Human Rights*

As already stated in the introduction, so far, the Inter-American Court of Human Rights has not had to pronounce itself on Article 23 of the ACHR. However, there is some jurisprudence on freedom of expression. As this freedom is relevant to a free public debate on electoral matters, a brief overview of the Court's understanding of freedom of expression follows. The frequent reference to democracy, without ever defining it, leads to the assumption that the Court would maintain its opinion in cases relating to the genuineness of elections.

The Inter-American Court of Human Rights stated in one of its advisory opinions that '[f]reedom of expression is a cornerstone upon which the very existence of a democratic society rests . . . It represents, in short, the means that enables the community, when exercising its options, to be sufficiently informed'.<sup>136</sup> The Court goes on by stressing the importance of freedom of expression:

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<sup>133</sup> UN doc. E/CN.4/1996/67, paras. 34-40.

<sup>134</sup> One need not wait until the next elections to see the effects of such practices. In the 2001 report, the Special Rapporteur refers back to the 1995 municipal elections and reports that '[s]ince then, the opposition parties have been complaining about attempts by the governing party to recover the nine mayorships [won by the opposition] by devious means; it is said that six of the nine mayors were bribed or pressured to join the ranks of the government party, the Democratic Party of Equatorial Guinea (PDGE)'. UN doc. E/CN.4/2001/38, para. 15.

<sup>135</sup> UN doc. E/CN.4/2000/40, para. 19(c).

<sup>136</sup> Inter-American Court of Human Rights, Advisory Opinion OC-5/85 of 13 November 1985, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, Series A, No. 5, para. 70.



[A] democratic society requires the guarantee of the widest possible circulation of news, ideas and opinions as well as the widest access to information by society as a whole . . . It is also in the interest of the democratic public order inherent in the American Convention that the right of each individual to express himself freely and that of society as a whole to receive information be scrupulously respected.<sup>137</sup>

The Inter-American Court of Human Rights highlights in its definition of freedom of expression, besides the individual rights, the rights of society as a whole. This points at the necessity of the *de facto* implementation of freedom of expression for all groups in the society of a state. This inclusiveness seems to be at the heart of the Court. It is understandable if one recalls the importance of freedom of expression for all participants of elections, candidates and voters. There is also the right to put information into circulation, a reference to the essential role of the press and media for the genuineness of the electoral process.

Regarding censorship of the media one can almost predict that the Inter-American Court of Human Rights would relate censorship to free public debate in the context of elections, maintaining the same line of argument. The Court states that censorship is:

an extreme violation of the right to freedom of expression [and] . . . impeding the free circulation of information, ideas, opinions or news . . . Here the violation is extreme not only in that it violates the right of each individual to express himself, but also because it impairs the right of each person to be well informed, and thus affects one of the fundamental prerequisites of a democratic society.<sup>138</sup>

The right to be well informed links freedom of expression directly to genuine elections, which should provide every voter with the possibility to make an informed choice, a requirement for genuine elections.

### 3.7 *The European Court of Human Rights*

In the case of *Bowman v. the United Kingdom*,<sup>139</sup> the complainant distributed anti-abortion leaflets during the time of the election campaign. The leaflets

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<sup>137</sup> Inter-American Court of Human Rights, Advisory Opinion OC-5/85 (*loc. cit.*, note 136), para. 69.

<sup>138</sup> *Ibid.*, para. 54.

<sup>139</sup> European Court of Human Rights, judgment of 19 February 1998, *Reports of Judgments and Decisions* 1998-I, pp. 176-209.

contained information on the intention of the different candidates for the parliamentary elections how they would vote on abortion-related laws or measures. According to section 75 of the 1983 Act, unauthorized persons<sup>140</sup> are prevented from spending more than GBP 5 on publications or campaigning material during election period. This provision was challenged before the European Court of Human Rights. The Court had to decide if the 1983 Act is compatible with the freedom of expression on the one hand and the right to free and fair (genuine) elections on the other.

The Court had stated that 'the two rights are inter-related and operate to reinforce each other'.<sup>141</sup> The *ratio* behind the 1983 Act is to 'contribute towards securing equality between candidates'.<sup>142</sup> However, the Court decided in this case that the restriction was not proportionate to the legitimate aim of ensuring equality of candidates, because the complainant had no other possibilities at her disposal to express her opinion. The judgment was criticized in the partly dissenting opinion of Judge Valticos who is of the opinion that the 1983 Act ensures precisely the genuineness of elections when preventing unauthorized persons from interfering with the election campaign. These persons would distort the established balance of the campaign.

I cannot accept that the fact that the British electoral system restricts the expenditure 'unauthorised' persons may incur in promoting or prejudicing the chances of a particular candidate in the period leading up to an election amounts to a breach of the Convention.<sup>143</sup>

He stresses that the 1983 Act was adopted 'to prevent powerful individuals or bodies undermining the fairness of elections or unduly influencing voters' opinions'.<sup>144</sup>

Judges Loizou, Baka and Jambrek develop the justification of the limitation of freedom of expression in their joint partly dissenting opinion and come to the conclusion that the 'equality of arms' in the campaign is the more important principle in this case.

There can be no doubt that limits on election campaign spending maintain equality of arms as between candidates, a most important principle in

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<sup>140</sup> An unauthorized person in the sense of the 1983 Act is any person other than the candidate, his or her agent or person authorized in writing by the election agent.

<sup>141</sup> *Bowman v. the United Kingdom* (*loc. cit.*, note 139), para. 42.

<sup>142</sup> *Ibid.*, para. 38.

<sup>143</sup> Partly dissenting opinion of Judge Valticos.

<sup>144</sup> *Ibid.*

democratic societies and in the electoral process. Once the 1983 Act . . . imposes limits on the spending of candidates so that wealthy candidates will not have an unfair advantage, then there must be limits on others, such as wealthy supporters or action groups, from spending money for the benefit of one candidate or in order to prevent the election of another, as adverse publicity against a candidate might go unanswered on account of the limit on the amount of money a candidate is allowed to spend.<sup>145</sup>

The limit of the amount of money unauthorized persons are allowed to spend is particularly low in the United Kingdom. However, the European Court of Human Rights usually leaves a wide margin of appreciation to the state when defining the exact regulation. The point under consideration was if the core content of the rights was at stake.

### *3.8 The Office for Democratic Institutions and Human Rights*

In its final report on the parliamentary election in Azerbaijan, the ODIHR refers to the genuineness of the elections when it states that other relevant freedoms have been generally respected.

During the campaign, fundamental freedoms were generally respected, with candidates in general enjoying freedom of movement, expression, association and assembly. Parties and candidates were able to hold meetings with voters, express their views, and distribute and display campaign material, albeit under unequal conditions. However, a few violent incidents against candidates were noted and opposition parties and the media reported some intimidation of supporters by some branches of State structures, including the police.<sup>146</sup>

The incidents of violence during the election campaign are detrimental to the electoral process. Even if only a few incidents occur, the fear of them holds back voters from taking part in meetings and debates. It affects their freedom in an indirect but real manner. The consequences of single incidents have a bigger range than the people directly involved.

The ODIHR refers to the scope of an election campaign in its final report on the elections for the House of Representatives in Croatia. It understands that the campaign serves the candidates *and* the voters. Therefore, a forum for a truly public debate including all participants in elections should be provided.

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<sup>145</sup> Joint partly dissenting opinion of Judges Loizou, Baka and Jambrek, para. 5.

<sup>146</sup> Republic of Azerbaijan, Parliamentary Elections, 5 November 2000 and 7 January 2001, Final Report, Chapter V, F. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).

'As in any election campaign, political parties should have the opportunity to present their political program and debate the issues with political rivals. Similarly, voters should receive information enabling them to make an informed choice on election day'.<sup>147</sup>

On the presidential election in Russia, the ODIHR reports the misuse of office of the President and his supporters during the election campaign, creating in this way an unfair competition. The public debate was not balanced, not representing different points of view and was, therefore, hindering the voters from making an informed choice.

One concern was the degree to which the Acting President would use the advantages of his office for the purposes of advancing his campaign. It became obvious that the personnel resources would be fully exploited. In particular was the fact that among his agents and registered representatives facilitating his campaign were an extraordinary number of senior officials of federal and regional administrative offices.<sup>148</sup>

This inequality of arms is seen as problematic for the genuineness of elections. '[I]t is unlikely that any other candidate could have taken advantage of this pool of personnel for their campaigns'.<sup>149</sup> The ODIHR explains that there is an ambiguity in the electoral law. 'The formulation in Article 44 creates a very fine line between legitimate campaign activities and abuses of office and the resources of the administration for campaign purposes. It would be difficult to argue that these ambiguities were not fully exploited during the presidential campaign'.<sup>150</sup> This is quite a cautious formulation used by ODIHR. It is not spelling out that the genuineness of the election was affected by these practices. In its preliminary conclusions the ODIHR states that 'law provides the framework for pluralist elections, for candidates to enter the political arena on an equal basis and a level playing field'.<sup>151</sup> It is not clear what the opinion of the ODIHR is in this case.

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<sup>147</sup> Republic of Croatia, Parliamentary Elections, 2 and 3 January 2000, Chapter IV, G, at p. 18. Available at: [http://www.osce.org/odhr/documents/reports/election\\_reports/](http://www.osce.org/odhr/documents/reports/election_reports/).

<sup>148</sup> Russian Federation, Presidential Elections, 26 March 2000, Final Report, Chapter VII, at pp. 20–21. Available at: [http://www.osce.org/odhr/documents/reports/election\\_reports/](http://www.osce.org/odhr/documents/reports/election_reports/).

<sup>149</sup> *Ibid.*, p. 21.

<sup>150</sup> *Ibid.*, p. 22.

<sup>151</sup> *Ibid.*, Annex.

## 4. UNIVERSAL SUFFRAGE

### 4.1 Background

The principle of universal suffrage implies that everyone should have the right to vote in elections. However, this principle is already limited by the first part of Article 25 of the CCPR, which refers to citizens only. Hence, everyone who holds the citizenship of a certain country is entitled to vote in elections. However, other restrictions, if reasonable and not discriminatory, are permitted. Such restrictions of the right to vote are generally admissible for aliens, minors, mentally ill and persons convicted of certain crimes. Regarding the limitation of the right to vote to citizens Nowak states that this restriction is not mandatory: Article 25 of the CCPR 'does not . . . prevent the States Parties from granting aliens the right to vote in the course of increasing internationalization and migration'.<sup>152</sup> In addition, there might be certain residence requirements. The historical reasons for these restrictions 'lay in the conviction that democratic participation called for a certain proximity to the State (citizenship) and a minimum degree of personal maturity in order to assume responsibility for the State'.<sup>153</sup> However, this reasoning is suitable to excessive extension to other groups such as 'alcoholics, prodigals, beggars, illiterates, prostitutes, Jews, servants or, more generally, women and persons of low social status'.<sup>154</sup> On the other hand, one could argue that aliens working and paying taxes in a country for years do have a proximity to the state, which should be considered. However, international human rights instruments are explicit on the requirement of citizenship for the right to vote.<sup>155</sup>

During the *travaux préparatoires* of the CCPR the apparent contradiction between the principle of universal suffrage and the restrictions was observed, but it was held that the principle of universal suffrage is a fundamental one and was, therefore, included.<sup>156</sup> With regard to what might be a reasonable restriction of the right to vote, two possible limitations were mentioned during

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<sup>152</sup> M. Nowak, 1993, p. 447, footnote 48.

<sup>153</sup> *Ibid.*, p. 446.

<sup>154</sup> *Ibid.*

<sup>155</sup> For Article 3 of Protocol No. 1 to the ECHR, which does not include the word 'citizen', see section 4.7 of this study.

<sup>156</sup> M. J. Bossuyt, 1997, p. 474: 'The opinion was expressed that the word "universal" was redundant in the light of the introductory clause . . . The majority, however, considered that the principle of "universal and equal suffrage" was a most fundamental one, and decided to include it in the article'.

the *travaux préparatoires*. 'It was pointed out that this referred to such matters as the minimum age for voting, or the exclusion of mentally ill persons'.<sup>157</sup>

Article 25 of the CCPR does not only confer the right to vote but also the opportunity to exercise this right. Something more is required than the formal inclusion in the voter lists.

For instance, it is not enough to extend formal voting eligibility to all citizens, including the aged, sick, prisoners and pre-trial detainees, persons abroad, etc., when it is not simultaneously ensured that these citizens are truly able to make use of their right to vote.<sup>158</sup>

This means that states are under the obligation to adopt positive measures to ensure the possibility of all voters to vote including those who for some reason are not able to present themselves at the polling station on election day.

#### 4.2 *The Human Rights Committee*

In General Comment No. 25 the Human Rights Committee refers to the admissible restrictions of the right to vote. 'For example, established mental incapacity may be a ground for denying a person the right to vote'.<sup>159</sup> It continues with another admissible restriction but also refers to those which are not admissible.

The right to vote at elections and referendums must be established by law and may be subject only to reasonable restrictions, such as setting a minimum age for the right to vote. It is unreasonable to restrict the right to vote on the ground of physical disability or to impose literacy, educational or property requirements. Party membership should not be a condition of eligibility to vote, nor a ground of disqualification.<sup>160</sup>

Unlike the case of mental disability it is not admissible to limit the right to vote of physically disabled persons. Those are very well able to make their choice between different candidates. The requirement of literacy or a certain level of education is also not a reasonable restriction. The fact that somebody did not have the possibility to learn to write and read or did not have access to the educational system does not limit his or her mental capacities to follow the

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<sup>157</sup> M. J. Bossuyt, 1997, p. 473.

<sup>158</sup> M. Nowak, 1993, p. 439.

<sup>159</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 4.

<sup>160</sup> *Ibid.*, para. 10.

electoral campaign and to vote. In fact, those persons have a special interest in having representatives in the institutions of the state that defend their interest. This is one more reason not to exclude illiterate from the electoral process, besides the obvious discrimination such exclusion would represent. The property requirement would exclude the majority from the electoral process and lead back to a feudal system, which is based on inequality of human beings. This concept is contrary to human rights and therefore totally unacceptable.

Regarding registration the Human Rights Committee expresses that the States Parties are under the obligation to adopt positive measure.

States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable and should not be imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.<sup>161</sup>

The effective opportunity to vote extends also to the registration process. Registration must be as inclusive and protected as the right to vote itself. For this purpose the Human Rights Committee highlights the necessity for a registration campaign. The difficulty lies in the fact that registration takes place at a time where elections seem to be far away. It is crucial to make voters understand the need to be registered and what the registration is needed for. It is, therefore, appropriate to carry out voter education even before or simultaneously to the registration.

For the voting itself positive measures to increase the participation in elections are needed. The Human Rights Committee indicates specific measures which should be adopted. Freedom of movement is relevant not only for the candidates during the election campaign, as shown in the previous section. It is crucial also for the voters to be able to present themselves at the polling stations.

Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority

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<sup>161</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 11.

languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.<sup>162</sup>

In an early complaint filed against Uruguay,<sup>163</sup> the Human Rights Committee adopted the view that the denial of the right to vote for members of opposition parties for a period of 15 years amounts to a violation of Article 25 of the CCPR.

The Human Rights Committee sees unreasonable restrictions of the right to vote in the following two cases. Firstly the exclusion of one group, as stated in its concluding observations on the state report of Paraguay, 'that the restriction on voting for students of military schools seems to be an unreasonable restriction on article 25 of the Covenant on the right to participate in public life'.<sup>164</sup> Secondly, the excessive extension of the time period of the restriction of the right to vote of convicted persons. Regarding the state report of the United Kingdom concerning Hong Kong, the Human Rights Committee holds 'that laws depriving convicted persons of their voting rights for periods of up to 10 years may be a disproportionate restriction of the rights protected by article 25'.<sup>165</sup>

If previous registration is necessary, the state has the obligation to adopt positive measures, which ensure the inclusion of all possible voters. Regarding the opportunity of a minority group without fixed residence to participate in elections and to vote, the Human Rights Committee recommends, in its concluding observations on the state report of Ireland:

that the State party undertake additional affirmative action aimed at improving the situation of the 'Travelling Community' and, in particular, facilitating and enhancing the participation of 'travellers' in public affairs, including the electoral process.<sup>166</sup>

In its concluding observations on the state report of Mexico, the Human Rights Committee welcomes the broadening of the right to vote to all citizens,

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<sup>162</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 12.

<sup>163</sup> *Alba Pietraroia v. Uruguay*, Communication No. 44/1979, views adopted on 27 March 1981, *Human Rights Committee: Selected Decisions under the Optional Protocol* (New York: United Nations, 1985), pp. 76-80.

<sup>164</sup> Report of the Human Rights Committee, Vol. I, UN doc. A/50/40, paras. 192-223, at para. 214.

<sup>165</sup> UN doc. CCPR/C/79/Add.57 (1995), para. 19.

<sup>166</sup> UN doc. CCPR/C/79/Add.21 (1993), para. 23.



independently of when and how they acquired the citizenship. 'The extension of the right to vote to persons who had hitherto been deprived of that right and . . . [to] citizens who are not Mexican nationals by birth are positive developments in ensuring respect for article 25 of the Covenant'.<sup>167</sup> Following its view adopted in General Comment No. 25 that the right to vote is in principle not excluded for aliens, the Human Rights Committee, regarding the state report of Finland, welcomes the Aliens Act, which gives non-citizens who have their residence in that country the right to vote in local elections.<sup>168</sup> A similar provision in Hungary is equally welcomed by the Committee.<sup>169</sup>

In its concluding observations on the state report of Kuwait, the Human Rights Committee demands the abolishment of discrimination against women. 'The State party should take all the necessary steps to ensure to women the right to vote and to be elected on an equal footing with men, in accordance with articles 25 and 26 of the Covenant'.<sup>170</sup> Regarding the situation of the Bedouins, the Committee stresses that it is important to grant citizenship without discrimination. Citizenship in turn is important because it is a fundamental requirement for the right to vote. The Committee urges the state to 'confer its nationality on a non-discriminatory basis and ensure that those who are granted Kuwaiti nationality are treated equally with other Kuwaiti citizens with regard to voting rights (arts. 25, 26)'.<sup>171</sup>

#### *4.3 The Committee on the Elimination of Racial Discrimination*

In its General Recommendation No. 20, the Committee on the Elimination of Racial Discrimination recognizes that the right to vote is limited to citizens.<sup>172</sup> However, following conclusions similar to those of the Human Rights Committee, the Committee on the Elimination of Racial Discrimination welcomes, in its concluding observations on the state report of Estonia, the fact 'that the right to vote in local elections has been granted to all permanent residents, regardless of their nationality'.<sup>173</sup>

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<sup>167</sup> UN doc. CCPR/C/79/Add.32 (1994), para. 5.

<sup>168</sup> UN doc. CCPR/C/79/Add.91 (1998), para. 8.

<sup>169</sup> UN doc. CCPR/C/79/Add.22 (1993), para. 4.

<sup>170</sup> Report of the Human Rights Committee, Vol. I, UN doc. A/55/40, paras. 452-497, at para. 461.

<sup>171</sup> *Ibid.*, para. 480.

<sup>172</sup> General Recommendation No. 20 (*loc. cit.*, note 57), para. 3.

<sup>173</sup> UN doc. CERD/C/304/Add.98 (2000), para. 7.

The Committee on the Elimination of Racial Discrimination positively notes the reform of the electoral system in its concluding observations on the state report of Pakistan. Minorities are given the right to vote on equal footing with the majority.

The repeal of the separate electoral system, which allowed members of minorities to vote only for certain reserved seats in elections, is welcomed. The fact that members of minorities are now entitled to participate directly in the general election process, in addition to electing their own representatives, is a positive development.<sup>174</sup>

The election of representatives of minority groups is in itself a positive measure to give those groups a voice and to protect their distinctiveness. But this measure should always be an additional one and cannot replace voting rights of members of minority groups.

Regarding the requirement of citizenship, in order to be entitled to vote in elections, reference is made to the cases contained in section 2.3 of this study. The relevant cases are the concluding observations on the state reports of Kuwait, Syria and Latvia. In the concluding observations on the state report of the Czech Republic, the Committee on the Elimination of Racial Discrimination illustrates a positive example on how such a problem can be addressed.<sup>175</sup>

#### *4.4 The Committee on the Elimination of Discrimination against Women*

In its General Recommendation No. 23, the Committee on the Elimination of Discrimination against Women identifies the following two obstacles for the exercise of the right to vote by women. First of all, illiteracy and, secondly, the fact that women are often not aware of the link between registering and voting and the possibilities for the improvement of their living conditions these right can confer.

Other important factors that inhibit women's full and equal exercise of their right to vote include their illiteracy, their lack of knowledge and understanding of political systems or about the impact that political initiatives and policies will have upon their lives. Failure to understand the rights, responsibilities and opportunities for change conferred by franchise also means that women are not always registered to vote.<sup>176</sup>

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<sup>174</sup> UN doc. CERD/C/304/Add.25 (1997), para. 8.

<sup>175</sup> See section 2.3, at pp. 63-64.

<sup>176</sup> General Recommendation No. 23 (*loc. cit.*, note 73), para. 20(a).

Regarding discrimination the Committee on the Elimination of Discrimination against Women notes that any discrimination based on sex is contrary to the CEDAW. Discrimination based on other grounds affects in practice women to a higher degree than men. The Committee notes that restrictions, which are already unreasonable according to the Human Rights Committee, such as the requirement of literacy or property, would in fact have a higher impact on women. Women have, in general, more limited access to the educational system than men and in regard to property they are more easily poor.

The enjoyment of the right to vote by women should not be subject to restrictions or conditions that do not apply to men or that have a disproportionate impact on women. For example, limiting the right to vote to persons who have a specified level of education, who possess a minimum property qualification or who are literate is not only unreasonable, it may violate the universal guarantee of human rights. It is also likely to have a disproportionate impact on women, thereby contravening the provisions of the Convention.<sup>177</sup>

In the concluding observations on the state report of Guatemala, the Committee on the Elimination of Discrimination against Women was satisfied 'that illiterate women were no longer discriminated against in their voting rights'.<sup>178</sup> The inadmissible restriction of the right to vote for literate persons has, as already stated, a high impact on women since their right to education is, in practice, more likely to be violated than it is for men. However, the Committee requested more detailed information about the exercise of the right to vote of women. 'Members requested statistical data on the number of women who participated in elections . . . and asked whether women in rural areas were restricted in exercising their voting rights'.<sup>179</sup>

Data covering the whole country is crucial in order to be able to assess the *de facto* implementation of such a right. Especially in rural areas the rights of women are more likely to be limited because women have limited access to information about their rights.

#### 4.5 The Commission on Human Rights

In most countries it is necessary to register in order to be able to exercise the right to vote. The registration process is, therefore, crucial and should be as

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<sup>177</sup> General Recommendation No. 23 (*loc. cit.*, note 73), para. 23.

<sup>178</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/49/38, paras. 38-87, at para. 53.

<sup>179</sup> *Ibid.*

inclusive as possible. The Special Rapporteur remarks, in her report, that this was problematic in Bosnia and Herzegovina in 1996.

For those people who intend to vote in person in the municipalities in which they were registered to vote in 1991, there will be no new voter registration process. For all other intending voters, such as refugees and displaced persons who wish to vote *in absentia*, a process of registration is under way, with a planned completion date in mid-July 1996. It is a matter of concern that rigid application of this completion date may serve to disenfranchise those who are blocked from travelling to locations at which they intend to vote or who may be displaced at a time after the cut-off date for completion of the process of registration.<sup>180</sup>

In cases where the freedom of movement is negatively affected and no possibility to overcome this situation before election day exists, additional measures must be adopted in order to guarantee the participation of the persons entitled to vote.

#### *4.6 The Inter-American Commission on Human Rights*

In its 2000 special report on Peru, the Inter-American Commission on Human Rights states that it agrees with the assessment of the OAS Election Observation Mission (EOM) and that the election of Alberto Fujimori occurred in violation of Article 23 of the ACHR.<sup>181</sup> Among other reasons, the Commission refers to practical obstacles to cast a valid vote by handing out ballots with a defect, which would be invalidated in the counting process. 'It was learned that at some voting stations in the city of Lima voters were given defective ballots'.<sup>182</sup> Handing out defect ballot papers equals a denial of the right to vote. The voter had no possibility to cast a valid vote from the beginning, even though he or she did express the wish to make use of the right to vote.

In its special report on Colombia, the Inter-American Commission on Human Rights refers to cases of intimidation of voters as an obstacle to exercising the right to vote. '[P]aramilitary groups . . . warned residents in certain areas of the country that they should not vote or otherwise take part in

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<sup>180</sup> UN doc. E/CN.4/1997/5, para. 9.

<sup>181</sup> Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru* (Washington, D.C.: General Secretariat, Organization of American States, 2000), Chapter IV, paras. 70 and 71.

<sup>182</sup> *Ibid.*, Chapter IV, para. 62.

the elections'.<sup>183</sup> The Commission expresses its concern about the effects of the activities of the paramilitary groups on the electoral process.

The Commission is extremely concerned that these consistent attacks, in violation of international humanitarian law, may eventually lead to a situation in which the Colombian citizenry does not have effective access to the right to vote and direct or representative political participation. The Commission calls upon the State to take all measures necessary to ensure that these rights to political participation are protected in order to ensure that Colombia remains a fully democratic State.<sup>184</sup>

The Inter-American Commission on Human Rights emphasizes that the state is under the obligation to guarantee the opportunity for all electors to exercise their right to vote. Security must be guaranteed during elections.

#### 4.7 *The European Court of Human Rights*

In the case of *Mathieu-Mohin and Clerfayt v. Belgium*, the European Court of Human Rights embraces the concept of universal suffrage and subjective rights of participation, hence the right to vote.<sup>185</sup> This is a concept which has previously been developed by the European Commission of Human Rights.

Article 3 of Protocol No. 1 to the ECHR does not explicitly refer to citizens as the entitled group. However, the European Court of Human Rights has adopted this term in the context of elections.

[T]he phrase 'conditions which will ensure the free expression of the opinion of the people in the choice of the legislature' implies essentially—apart from freedom of expression (already protected under Article 10 of the Convention)

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<sup>183</sup> Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia* (Washington, D.C.: General Secretariat, Organization of American States, 1999), Chapter IX, para. 36.

<sup>184</sup> *Ibid.*, Chapter IX, para. 48.

<sup>185</sup> *Mathieu-Mohin and Clerfayt v. Belgium*, judgment of 2 March 1987, *Publications of the European Court of Human Rights*, Series A, Vol. 113, at para. 51. In this case the appointment of the members of the Community and Regional Councils and Executives was questioned. The applicants took their oath in French and were, therefore, members of the French-language group in the House of Representatives, although they were elected in a Flemish-speaking district. Being members of the French-language group they could not be represented in the Flemish Councils of the respective districts and were excluded from the decision-making which concerned these districts. However, the European Court of Human Rights did not find a violation of Article 3 of Protocol No. 1 to the ECHR.

—the principle of equality of treatment of all *citizens* in the exercise of their right to vote and their right to stand for election.<sup>186</sup>

The European Court of Human Rights states that the right to vote is subject to restrictions and applies to Article 3 of Protocol No. 1 to the ECHR its doctrine of the margin of appreciation, which gives states the possibility to formulate the restrictions according to their historical background and political systems.

The [right] in question [is] not absolute . . . In their internal legal orders the Contracting States make the [right] to vote . . . subject to conditions which are not in principle precluded under Article 3 . . . They have a wide margin of appreciation in this sphere, but it is for the Court to determine in the last resort whether the requirements of Protocol No. 1 have been complied with; it has to satisfy itself that the conditions do not curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness; that they are imposed in pursuit of a legitimate aim; and that the means employed are not disproportionate . . . In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature'.<sup>187</sup>

In spite of the wide margin of appreciation conferred by the European Court of Human Rights, the Court leaves no doubt that the core content of the right to vote must in any case be respected.

In the case of *Matthews v. the United Kingdom*, the European Court of Human Rights holds that the State Party violated the right to vote of the applicant because it failed to extend the elections for the European Parliament to the territory of Gibraltar. The Court also states, implicitly, that a restriction of the right to vote for those citizens who do not reside in the country would be admissible.

[I]n the present case the applicant, as a resident of Gibraltar, was completely denied any opportunity to express her opinion in the choice of the members of the European Parliament. The position is not analogous to that of persons who are unable to take part in elections because they live outside the jurisdiction, as such individuals have weakened the link between themselves and the jurisdiction.<sup>188</sup>

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<sup>186</sup>*Mathieu-Mohin and Clerfayt v. Belgium* (*loc. cit.*, note 185) para. 54. Emphasis added.

<sup>187</sup> *Ibid.*, para. 52.

<sup>188</sup> *Matthews v. the United Kingdom*, judgment of 18 February 1999, *Reports of Judgments and Decisions* 1999-I, pp. 251-304, at para. 64.

Even though not mandatory, many European states have, however, implemented measures which allow citizens to vote even when they are physically outside the jurisdiction of the state. It may be true that these citizens have weakened the link between themselves and the state, but this should not be a reason for the state to cut this link to its citizens.

In the case of *Labita v. Italy*, the complainant was struck off the voter register because he was suspected of belonging to the Mafia. The argument of the government was that the measure was 'to prevent the Mafia exercising any influence over elected bodies . . . [i]n view of the real risk that persons suspected of belonging to the Mafia might exercise their right to vote in favour of other members of the Mafia'.<sup>189</sup> The European Court of Human Rights reaffirmed its previous views about Article 3. It comes to the judgment in this case that though it 'has no doubt that temporarily suspending the voting rights of persons against whom there is evidence of Mafia membership pursues a legitimate aim',<sup>190</sup> there has been a violation because the application of the measure was disproportionate. Competent courts had acquitted the complainant and he was no longer under suspicion of crime.

#### 4.8 *The Office for Democratic Institutions and Human Rights*

In the final report on the parliamentary elections in Romania, the ODIHR points out the disadvantage of having the voter lists based on civil records. This leads to the exclusion of persons who do not have a birth certificate, a permanent residence address, or who have not applied for identity documents. The ODIHR identifies the Roma minority as having been unable to exercise their right to vote due to this way of establishing the voter lists.<sup>191</sup>

As regards the parliamentary elections in Serbia, the ODIHR observed similar problems with the voter lists which, however, in this case did not negatively affect the right to vote. The ODIHR concluded that in the end 'neither the failure to prepare a national computerised register fully, nor inaccurate registers prevented voters from exercising their right to vote on election day'.<sup>192</sup>

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<sup>189</sup> *Labita v. Italy* (Application No. 26772/95), European Court of Human Rights, judgment of 6 April 2000, para. 199.

<sup>190</sup> *Ibid.*, para. 203.

<sup>191</sup> Romania, Presidential and Parliamentary Elections, 26 November and 10 December 2000 (*loc. cit.*, note 105), Chapter VI, A, at p. 14.

<sup>192</sup> Republic of Serbia/Federal Republic of Yugoslavia, Parliamentary Elections, 23 December 2000 (*loc. cit.*, note 104), Chapter V, E, at pp. 9–10.

Regarding the adoption of positive measures to increase the effective possibility to exercise the right to vote, the ODIHR states, in its final report of the parliamentary elections in Armenia, that special arrangements are set up for military personnel and pre-trial detainees. In this way these groups are given the opportunity to exercise their right to vote.

Military personnel are registered in regular voter lists unless the military base is located more than 50 kilometres away from the closest precinct. Commanders have to communicate the number of military personnel to the community heads before they set up a precinct and submit the names of military voters five days before polling day . . . Citizens under detention but not yet convicted are entitled to vote, although only in the proportional elections. To this effect, precincts are organised in the detention facility. The Head of the detention institution, together with the relevant REC [Regional Election Commission], compile the voter list 3 days prior to polling day. Two copies of the lists are forwarded to the respective PEC [Precinct Election Commission] Chairperson no later than two days before polling day.<sup>193</sup>

Similar but farther-reaching possibilities for the opportunity to exercise the right to vote were established for the presidential elections in Ukraine.

Ordinarily, military personnel were registered at the polling stations close to their barracks. In a very small number of cases, the CEC [Central Election Commission] granted special polling stations to be formed in barracks if located some distance from a population centre. Hospitals, sanatoria, prisons, ships at sea and representative offices overseas could establish a polling station on premises. In each case, the director or head of that institution was responsible for drawing up lists of eligible voters.<sup>194</sup>

These kinds of measures vary from country to country. The important point is that the exercise of the right to vote is facilitated to as many voters as possible.

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<sup>193</sup> Republic of Armenia, Parliamentary Elections, 30 May 1999, Final Report, Chapter IV, D, 2, at p. 15. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).

<sup>194</sup> Ukraine, Presidential Elections, 31 October and 14 November 1999, Final Report, Chapter IX, at p. 25. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).



## 5. EQUAL SUFFRAGE AND SECRET VOTE

### 5.1 Background

The principle of equal suffrage means the principle of one person, one vote and that each vote carries equal weight. 'Therefore, curia, class or plural suffrage that, e.g., accords more weight to the votes of large land owners than to those of voters in other curiae violates the principle of equal suffrage'.<sup>195</sup> However, reasonable restrictions are admissible, such as the inequalities in the effect of votes in different electoral systems. Article 25 of the CCPR was not meant to prescribe any specific electoral system. During the *travaux préparatoires* of the Covenant it was thought that the provision 'would leave States parties to the covenant free to regulate their own electoral systems, provided each vote carried equal weight'.<sup>196</sup>

There would be a violation of the principle of equal suffrage in cases where the electoral boundaries are drawn in such a way that it discriminates against certain groups of society.<sup>197</sup>

As for the secrecy of the vote, it is held that this is the most important guarantee of free (genuine) elections.<sup>198</sup> States are not only under the obligation to respect the secrecy of the vote but must also adopt positive measures to create the opportunity for the voters to cast their votes without fear of being observed.<sup>199</sup> As with the other components of Article 25 of the CCPR, the secret vote is subject to restrictions, provided they are reasonable, that is, factually justified and non-discriminatory. This might be the case of older persons or handicapped persons who are assisted in marking the ballot paper. It might also be absentee voting, that is, vote by correspondence, which is meant for voters who cannot for some reason vote in the polling station. This process offers fewer guarantees for the secrecy of the vote, but the vote by correspondence is covered by the secrecy of correspondence.<sup>200</sup> These voters would otherwise be unable to exercise their right to vote.

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<sup>195</sup> M. Nowak, 1993, p. 448.

<sup>196</sup> M. J. Bossuyt, 1987, pp. 474–475.

<sup>197</sup> See the reservation of Australia, reproduced in: M. Nowak, 1993, pp. 748–750, at p. 749.

<sup>198</sup> M. Nowak, 1993, p. 449.

<sup>199</sup> *Ibid.*, p. 448.

<sup>200</sup> *Ibid.*, p. 449.

## 5.2 The Human Rights Committee

In its General Comment No. 25, the Human Rights Committee does not state any preference towards an electoral system as long as the principle of one person, one vote is observed. Any electoral system implies, with the exception of the pure proportional representation, a distortion between the votes and their translation into parliamentary seats. The Human Rights Committee accepts this distortion but it excludes distorted distribution of voters. In this respect it draws attention to the delimitation of the constituencies.

Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.<sup>201</sup>

Regarding the secrecy of the vote the Human Rights Committee establishes the following, including also the security of the ballot boxes and the count:

States should take measures to guarantee the requirement of the secrecy of the vote during elections, including absentee voting, where such a system exists. This implies that voters should be protected from any form of coercion or compulsion to disclose how they intend to vote or how they voted, and from any unlawful or arbitrary interference with the voting process. Waiver of these rights is incompatible with article 25 of the Covenant. The security of ballot boxes must be guaranteed and votes should be counted in the presence of the candidates or their agents. There should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes. Assistance provided to the disabled, blind or illiterate should be independent. Electors should be fully informed of these guarantees.<sup>202</sup>

The importance of the presence of party observers during the count as well as the security of the ballot boxes relate to the principle of equal vote. There must be a guarantee to ensure that nobody can cast more than one vote during the elections. And when the count is done there must also be mechanisms, which guarantee that votes are not unduly invalidated. The presence of party

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<sup>201</sup> General Comment No. 25 (*loc. cit.*, note 36), para. 21.

<sup>202</sup> *Ibid.*, para. 20.

observers ensures this; they ensure that each valid vote for their respective party counts. The point that voters must be fully informed of these measures and the right to secret vote is important, because they themselves have a great interest in keeping the vote secret. If aware of this right, voters would make an effort to protect the secrecy of their vote in the voting booth and would demand the observance of the secret vote, since the secrecy offers protection to them.

The Human Rights Committee states, in its concluding observations of the state report of the United Kingdom, with regard to the electoral system in Hong Kong, that the requirements of the principle of equal vote of Article 25 of the CCPR are not met because the weight of each vote depends on property or function. The Committee:

underscores in particular that only 20 of 60 seats in the Legislative Council are subject to direct popular election and that the concept of functional constituencies, which gives undue weight to the views of the business community, discriminates among voters on the basis of property and functions. This clearly constitutes a violation of articles 2, paragraph 1, 25 (b) and 26.<sup>203</sup>

Regarding the state report of Libya, the Human Rights Committee stresses the obligation assumed by the state to hold genuine and secret elections. 'More specifically, the Committee stresses that article 25 provides for genuine elections with secret ballot and that the State party must comply with this requirement'.<sup>204</sup> By highlighting the secrecy of the election one can conclude that this element of Article 25 of the CCPR is of crucial importance to the Committee.

### *5.3 The Committee on the Elimination of Racial Discrimination*

Regarding the implementation of the principle of equal suffrage and secret vote under Article 5 of the CERD, the Committee on the Elimination of Racial Discrimination is mostly confronted with the lack of information provided in the state reports and can therefore not contribute to the development of a common understanding of this element.

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<sup>203</sup> UN doc. CCPR/C/79/Add.57 (1995), para. 19.

<sup>204</sup> UN doc. CCPR/C/79/Add.101 (1998), para. 15.

#### 5.4 *The Committee on the Elimination of Discrimination against Women*

In General Recommendation No. 23, the Committee on the Elimination of Discrimination against Women speaks out clearly in relation to the principle of secret vote that 'many men influence or control the votes of women by persuasion or direct action, including voting on their behalf' and that '[a]ny such practices should be prevented'.<sup>205</sup> The problematic point of these practices is that the secrecy of the vote of women is automatically jeopardized. Women are not entirely free to make their own choice, and these are not isolated cases but a general problem. The right to vote also means the right to cast the own vote. The secrecy of the vote is the only effective guarantee that voters can vote according to their own choices. During the pre-election phase all kinds of influence or pressure are directed towards voters in general. Women are especially sensitive to these influences and pressures. It is, therefore, even more important that they dispose of complete secrecy when voting and that they can have confidence that the vote remains secret.

Regarding the state report of Algeria, the Committee on the Elimination of Discrimination against Women 'welcomes the elimination of proxy votes which had enabled a husband to vote in place of his wife'.<sup>206</sup> Or in other words such a system had been changed where the vote conferred to the wife could not be exercised by the woman on her own and in secrecy.

One could see the proxy vote, when a husband votes on behalf of his wife, under two aspects. First, one in which the woman formulates her choice and a mechanism that ensures that her husband votes according to that choice. This would be similar to voting assistance for disabled persons. Two problems arise from this view of the proxy vote. First, one can hardly accept that married women suffer from any incapability that could justify such practices and, secondly, any assisted vote is necessarily not secret vote. The assisted vote should always be an exception. Positive measures must be adopted to overcome practical difficulties. Illiteracy, for example, can be overcome through inclusion of photographs of the candidates. Female voters are likely to represent 50 per cent of the voters or more. If all of them vote through assisted or proxy vote one cannot speak of an exception. So, even if one looks at the proxy vote as assisted vote, problems do arise which need not exist. The obvious solution is to eliminate the proxy vote.

The second and more realistic situation is that the husband disposes in practice of two votes, which in turn violates the principle of one person, one

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<sup>205</sup> General Recommendation No. 23 (*loc. cit.*, note 73), para. 20(c).

<sup>206</sup> Report of the Committee on the Elimination of Discrimination against Women, UN doc. A/54/38/Rev.1, Part I, paras. 41-94, at para. 62.

vote. The principle of equal suffrage would be violated. In one way or the other, the proxy vote is a violation of the provisions on elections.

On top of this it relates indirectly to the success of female candidates. One can assume that, when men exercise the vote of women, female candidates have, in practical terms, fewer chances to be elected since men are less likely to vote for them. In this way, the proxy vote would jeopardize any quota regulation and affect the right to stand for elections of female candidates.

### *5.5 The Commission on Human Rights*

The Special Rapporteur on Equatorial Guinea points out in his report two practices. The first does not guarantee the principle of equality, one person, one vote, if a voter can vote twice. There should be measures to avoid double voting. The second relates to the secrecy of the vote.

Other aspects also called in question included the decision not to use indelible ink to identify voters, which might have made it easy to cast a double vote; . . . the fact that the ballot papers with the lists of candidates of the official party and those listing the opposition candidates were in different places, thus frightening voters, who regarded this as a 'public ballot'.<sup>207</sup>

Regarding the secrecy of the vote, it would be more appropriate to have only one ballot paper, which includes all candidates. Separate ballot paper for different lists of candidates reveal already the preferences of the voter when he or she asks for one or the other list.

The transparency of the process was also challenged by 'the exclusion of the representatives of the opposition from the counting of votes and the holding of a recount by the National Electoral Board'.<sup>208</sup> This jeopardizes the guarantees for a fair count of the votes. There may be undue invalidation of votes, which means that not all votes are considered equally. Party representatives should have the possibility to follow all stages of the voting and the count, including a recount, since the official result is established by the recount.

### *5.6 The Inter-American Commission on Human Rights*

Besides the problems with the defect ballot papers referred to above in section 4.6, the Inter-American Commission on Human Rights, in its 2000 special

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<sup>207</sup> UN doc. E/CN.4/1996/67, para. 43.

<sup>208</sup> *Ibid.*

report on Peru, states that it agrees with the assessment of the OAS Election Observation Mission (EOM) and that the election of Alberto Fujimori occurred in violation of Article 23 of the ACHR.<sup>209</sup> The EOM saw a problem in the practice of the personnel of the polling station, which negatively affects the secrecy of the vote. 'In Huiro, Cuzco, Colegio San Carlos Mariátegui, the EOM found that the voters are forced to deliver their ballot to the voting station personnel, who then place it in the ballot box, rather than doing so themselves'.<sup>210</sup> In this way voters could not be sure that their vote was secret.

In its special report on Mexico,<sup>211</sup> the Inter-American Commission on Human Rights refers to reforms of the electoral process and points out the problem of how the electoral districts are drawn. This has an impact on how much weight each vote has, when in every district a certain number of parliament members are elected.

One of the principal weaknesses of the electoral system was the fact that voting districts were the same as those that had been drawn up in 1977 on the basis of the 1970 census. The outdated information meant that there were significant imbalances in the value of a vote, thereby violating the principle of an equal vote.

As a result, the new 'districting' was aimed at achieving a better distribution of districts as well as better political representation of citizens. The new boundaries of the 300 electoral districts, of the 40 local districts of the Federal District and of the five multi-slate circumscriptions, which were drawn in accordance with the provisions of Article 53 of the Constitution, were based on the general population census of 1990.<sup>212</sup>

Data resulting from a 20-year-old census is certainly not adequate for the delimitation of the circumscriptions. Phenomena such as urban migration must be considered and the delimitation should be up-dated at reasonable intervals.

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<sup>209</sup> *Op. cit.*, note 181, Chapter IV, paras. 70 and 71.

<sup>210</sup> *Ibid.*, Chapter IV, para. 62.

<sup>211</sup> Inter-American Commission on Human Rights, *Report on the Situation of Human Rights in Mexico* (Washington, D.C.: General Secretariat, Organization of American States, 1998).

<sup>212</sup> *Ibid.*, para. 460 and 461.

## 5.7 *The European Court of Human Rights*

In the case of *Mathieu-Mohin and Clerfayt v. Belgium*,<sup>213</sup> the European Court of Human Rights states that Article 3 of Protocol No. 1 to the ECHR does not introduce a specific electoral system and that the states dispose of a wide margin of appreciation. The Court explains that the principle of equal suffrage is not absolute and that limitations are necessary in any system.

Electoral systems seek to fulfil objectives which are sometimes scarcely compatible with each other: on the one hand, to reflect fairly faithfully the opinions of the people, and on the other, to channel currents of thought so as to promote the emergence of a sufficiently clear and coherent political will. In these circumstances the phrase 'conditions which will ensure the free expression of the opinion of the people in the choice of the legislature' implies essentially—apart from freedom of expression . . . —the principle of equality of treatment of all citizens in the exercise of their right to vote and their right to stand for election.

It does not follow, however, that all votes must necessarily have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes'.<sup>214</sup>

However, the principle of equal suffrage should not be neglected and the number of 'wasted votes'—that is, votes which in practice are not translated into parliamentary seats—should be limited to a strictly inevitable number.

## 5.8 *The Office for Democratic Institutions and Human Rights*

Regarding the final report on the presidential and parliamentary elections in Romania, the ODIHR highlights the problem of family vote, which excludes the full secrecy of the vote of single family members.

Family voting occurred in 28% of the cases and was more of a problem outside of Bucharest—in rural areas 47% and urban areas 18%. If a man and women entered the polling booth together, not only would the secrecy of the vote be compromised but one spouse could also influence the vote of the other.<sup>215</sup>

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<sup>213</sup> *Loc. cit.*, note 185.

<sup>214</sup> *Ibid.*, para. 54.

<sup>215</sup> Romania, Presidential and Parliamentary Elections, 26 November and 10 December 2000 (*loc. cit.*, note 105), Chapter VII, at p. 16.

On the presidential elections in Ukraine, the ODIHR reports, for the first round, incidents affecting the principle of one person, one vote. '[O]bservers witnessed voters handed more than one ballot'.<sup>216</sup> In practice this means that these voters could fill in more than one ballot and cast them into the ballot box. By the time of counting, the ballots would each count, allowing in this way for one person to have several votes. Another problem in the elections in Ukraine concerned the secrecy of the vote. The possibility to have assistance for voting, which should be only an exception, was abused. The report reads: 'Whilst voters could ask for assistance when casting their vote in private if they required it, observers reported that this happened surprisingly frequently (27.14%)'.<sup>217</sup> In one polling station 'students were coerced to vote, and . . . their vote was not cast in secret'.<sup>218</sup> In another station, '400 students voted under the watchful eye of "guards" wearing red armbands hired by the college'.<sup>219</sup>

These incidents were repeated during the second round of the Ukraine election. The situation was, however, aggravated. It became clear that the management of the ballot papers and the control of double voters are crucial to guarantee the equality of votes. The ODIHR reports that in one polling station 1,668 people were registered to vote and 1,678 people had voted. Ten voters voted twice, in clear violation of the principle one person, one vote. Problems concerning the management of ballot papers were the following: giving to voters more than one ballot paper mentioned above and ballot stuffing. 'In Odessa, observers were able to verify an allegation of ballot stuffing, where a significant number of extra ballot papers were found in the box compared to the number of signatures on the voter lists'.<sup>220</sup> The management of the ballot papers is not only important during the voting procedures but also when it comes to the count. 'Observers reported that the procedures for the counting of votes were not all correctly followed: ballot boxes opened before invalidating unused ballot papers'.<sup>221</sup> This practice leaves the possibility open to add ballots filled in a backroom. This is possible if one looks at Georgia

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<sup>216</sup> Ukraine, Presidential Elections, 31 October and 14 November 1999 (*loc. cit.*, note 194), Chapter X, A, at p. 26.

<sup>217</sup> *Ibid.*, Chapter X, A, at p. 26.

<sup>218</sup> *Ibid.*, p. 27.

<sup>219</sup> *Ibid.*

<sup>220</sup> *Ibid.*, Chapter X, B.

<sup>221</sup> *Ibid.*, Chapter XI.



where '[o]n one occasion, the PEC chairman counted the number of unused ballots in a different room'.<sup>222</sup>

All these incidents are not only a simple disregard of the electoral rules in that state, but violate the international human rights provisions on elections. The principle of equal suffrage has a simple content and is easily understandable, but one can observe quite an effort to find ways to violate this principle.

## 6. CONCLUSIONS

As mentioned in the introduction, there is a need to answer first the question whether it is possible to use the findings exposed in the previous sections as an alternative to the current practices of drafting rules for election observation without considering human rights norms on elections related matters.

The previous sections show how the international human rights bodies and institutions understand the subject matter included in Article 25 of the CCPR. A substantial number of opinions on Article 25 and the other provisions on elections<sup>223</sup> has already been adopted. Reviewing the points made on the different elements derivable of Article 25 it is necessary to highlight the following.

On standing for elections the most extensive material was found. This might be because candidates have a higher motivation to present their individual claims than ordinary voters. The requirement of citizenship is a formal one. It is, however, important to analyse on what basis citizenship is granted and if discriminatory practices are excluded. In the case of Ivory Cost, for example, it was required that 'any candidate for the presidency in 1995 must be Ivorian by birth and born of parents who were themselves Ivorian by birth'.<sup>224</sup> Besides discriminatory because creating two categories of citizens, this provision was impossible to fulfil since 'civil status was virtually unknown before 1960'.<sup>225</sup>

The admissibility of independent candidates should be seen as an open possibility under Article 25 of the CCPR. Without underestimating the role and

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<sup>222</sup> Republic of Georgia, Presidential Election, 9 April 2000, Final Report, Chapter V, E, at p. 20. Available at: [http://www.osce.org/odihr/documents/reports/election\\_reports/](http://www.osce.org/odihr/documents/reports/election_reports/).

<sup>223</sup> The other provisions are: Article 5 of the CERD, Article 7 of the CEDAW, Article 23 of the ACHR, Article 3 of Protocol No. 1 to the ECHR and paragraphs 5 and 7 of the Copenhagen Document of the OSCE.

<sup>224</sup> T. Coulibaly, 2000.

<sup>225</sup> *Ibid.*

functions of political parties, the admissibility of independent candidates would increase the opportunity of citizens to participate actively in the electoral process.

The quota regulation is fully embraced by the different committees. This is not self-evident. On the national level, in many states, there is an ongoing debate about an eventual inclusion of a quota regulation into the electoral law or such regulations are even refused. Without opening the discussion on the appropriateness of such regulation one must recognize that in countries where these have been put into practice the number of women in elected office has increased. This is to be welcomed.

The most complex element derivable from Article 25 of the CCPR is genuine elections. The principle of free choice between different candidates and an adequate environment is achieved through the realization of other freedoms. Freedom of expression has a crucial function for the public debate.

Another issue related to the 'other' freedoms is violence against or intimidation of candidates or voters. It is important that elections are held in a peaceful environment not only to guarantee their genuineness but also to maintain the electoral circle as an ongoing process.

Financial aspects were also relevant during the 2000 elections in Haiti but in the opposite way. The elections were several times postponed. By the time the election campaign was to be run, the opposition parties did no longer dispose of any financial resources to participate actively in the campaign. In this case any limitation on campaign expenditure could not solve the problem of an unbalanced campaign.

It is true that one-party systems are not excluded with reference to the wording of Article 25 of the CCPR and the *travaux préparatoires*. However, the international treaties should be seen as living instruments. Nowadays, most of the states, which held during the drafting of the Covenant that one-party systems are admissible under Article 25, moved away or are about to move away from this understanding. It is also clear the Human Rights Committee prefers multi-party systems to one-party systems. Steiner referred in 1988 to: '[M]ore often it [the right to political participation] becomes another weapon of rhetorical battle, a convenient, even authoritative concept through which each of the world's ideological blocs, infusing the right with its own understanding, attacks the others for violation those understandings'.<sup>226</sup> However, these times of ideological confrontation are hopefully behind us. One must also bear in mind that the conditions mentioned by Nowak are, in practice, not very likely to be realized. For all these reasons, it is preferable to require a multi-party system under Article 25 of the CCPR and other provisions relating to elections.

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<sup>226</sup> H. J. Steiner, 1996, p. 385.

As stated during the drafting period, the principle of universal suffrage is fundamental, and it was felt that the reference to 'every citizen' is not sufficient. The different human rights bodies identify explicit references on admissible and inadmissible restrictions of the principle of universal suffrage.

Participation in elections should be as inclusive as possible and must cover as many voters as possible, and restrictions must be limited to a strictly necessary level. The test of legality, reasonableness and non-discrimination must be applied scrupulously. This is important for the right to vote in general and for the establishment of the voter lists in particular, which must be as inclusive as possible. In both cases the state is under an obligation to adopt positive measures in order to comply with the treaty provisions.

The positive measures mentioned by the different institutions should include civic education. It cannot be expected that persons entitled to the right to vote undergo the process of voter registration and voting on election day if they do not understand why elections are necessary. Civic education is a truly ongoing process since new voters are to be included in the process when they reach the required minimum age.

In some states voting is compulsory. This provision increases without doubt the participation of the voters in election. The question is if this is admissible under Article 25 of the CCPR. No material on this issue was found. One can only speculate about the position of the different bodies and institutions. Some international human rights treaties include, besides the rights of human beings, also the duties<sup>227</sup> they have towards others or the society they live in. Historically this approach was not followed, as human rights were understood as a defence mechanism against the abuses of the state. Duties would, in this line of thinking, only weaken the position of the individual vis-à-vis the state authorities. However, duties, if included in international human rights treaties, are of very general content.

Regarding the right or duty to vote it seems more appropriate to leave the possibility not to vote open to the voter since non-participation might also be a form of expression of his or her disapproval of the electoral process or the political party spectrum.

On equal suffrage, the international bodies and institutions deal with very practical issues such as ballot paper management and the design of the constituencies. The secrecy of the vote as a guarantee for genuine election is given due attention.

It is important to underline that none of the international human rights treaties under consideration imposes any specific electoral system. The only requirement is the respect of the principle one person, one vote. This means

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<sup>227</sup> For the treaties under consideration in this study, see Article 32 of the ACHR.

that states are free to design their electoral system, provided the mentioned principle is observed. In this way a response is given to the demands for national sovereignty in the electoral process.<sup>228</sup> States do dispose of some margin to design their own electoral system, which is important since there is no universal system which suits all states equally. It also means that if any election observation mission analyses and comments the electoral law of a given state that defines the electoral system, it does so in its own capacity only.

Accuracy in the electoral process, especially for the management of ballot papers and transparency of the count, is not by coincidence one of the highest concerns during the electoral process. Accuracy is crucial for the respect of the principle of equal suffrage. Each vote is equally important because every vote has equal weight and each voter is entitled to cast only one vote.

It has been stated that the most important guarantee for genuine elections is the secrecy of the vote.<sup>229</sup> This can be illustrated if one looks at the problematic family vote. It relates not only to the secrecy of the vote of women or men but also to the free choice between the candidates. The woman or the man who exercises the vote under the supervision of her husband or his wife needs to justify her or his choice at least before one person. This means that the necessary justification is one of the decisive elements of her or his choice. Free choice is compromised and, therefore, the genuineness of the elections. The secrecy in a way serves the element of genuine elections, but it is that fundamental that it found its own place in the provisions on election. Besides, the idea of the secret vote in election is much older than sometimes thought. Cusanus included the secret vote in his writings on the election of the king as early as in 1433.<sup>230</sup>

One might wonder if the understandings of the different human rights bodies are elaborated well enough to serve as a basis for election observation. With the exception of the duty to vote, all points were taken up by the different bodies. It is true that the human rights bodies do not often spell out the violation of Article 25 of the CCPR or of the relevant provisions of the other international human rights treaties. They use rather diplomatic language. This is understandable if one recalls that, although the provisions of the human rights treaties are legally binding on states, there is no executive power at the disposal of these bodies. The European Court of Human Rights is an exception when it comes to the execution of its judgments. However, be they expressed

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<sup>228</sup> See the introduction to this study.

<sup>229</sup> See section 3.1, at p. 74.

<sup>230</sup> F. Pukelsheim, 2001.

diplomatically or directly, the opinions adopted by the bodies and institutions under consideration remain the same, they are identified and can be applied.

The important point is that the views expressed go far beyond repeating general principles, these principles are well defined and they are interrelated and not isolated from each other. All elements of Article 25 of the CCPR together form the electoral process. There is vast material available. This material refers to very concrete and practical aspects of elections, such as, for example, the admissible restrictions of the right to stand for elections. This material can therefore be extremely useful to election observation missions.

Another question is how detailed international understandings on election related issues should be. It is not the purpose of the CCPR or other international human rights treaties to establish one universal or regional electoral code. States should dispose of some freedom in designing and organizing elections according to the concrete circumstances. And the choice between the different electoral systems is completely free. The establishment of minimum standards was the purpose of the drafters of the treaties. Bearing this in mind, one must admit that the body of understandings is already well established and developed. Hence when the UN General Assembly or other bodies refer to Article 25 of the CCPR, Article 21 of the UDHR or to the provisions on elections of other international human rights treaties, they are not using empty formulas.

As to the question of whether these understandings of the international bodies are providing a possible basis for election observation missions, one must recognize that this is the case. If one takes, for example, *The ODIHR Election Observation Handbook* it is possible to retrace the mentioned principles to the election elements derivable from Article 25 of the CCPR. The handbook enumerates seven principles or OSCE commitments summed up in key words as follows: universal, equal, fair, secret, free, transparent and accountable.<sup>231</sup> These are taken from the relevant OSCE documents. They can be translated into the terminology of this study. Universal would stand for universal suffrage and partly for standing for election, equal for equal suffrage, secret for secret vote and free and fair for genuine elections. The principle of transparency is linked to the counting process and would be included in the element of equal suffrage in terms of Article 25 of the CCPR.<sup>232</sup> The elements derivable

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<sup>231</sup> *The ODIHR Election Observation Handbook*, 1999, p. 4.

<sup>232</sup> The principle of accountability, according to the ODIHR, means that the elected are to be installed in office and that they are accountable to the electorate. The first part of this principle would be parallel to the element of guaranteeing the free expression of the will of the electorate of Article 25 of the CCPR. The will of the electorate needs to be guaranteed, that is, the results of the elections need to be observed and the elected must take their seats in

from Article 25 would fulfil the functions of guiding principles as well as the OSCE commitments and would be a solid basis for election observation missions since these elements are well defined.

Even though the missions are formally separated from the various treaty implementation mechanisms, they are free to include the treaty provisions and the findings on them in their own guidelines. They could also contribute to the monitoring of the implementation. The submission of their reports to the different committees would be desirable since these often suffer from lack of information concerning the state reports. Co-operation could be achieved, in the sense that knowledge flows both ways if the missions include the findings of the committees in their work and provide the committees with information obtained during the fieldwork.

Having answered the instrumental questions whether there is an alternative to how election observation missions could be designed, another point, which must be addressed, is whether it is preferable to use international treaty provisions and the related findings of the different bodies and institutions.

As to the use of the findings of the international human rights bodies and institutions in election observation missions there is no contradiction<sup>233</sup> in what the missions are doing and the findings of the human rights bodies. But still, the reference to international law remains secondary in the missions. In *The ODIHR Election Observation Handbook*, for example, only reference to Article 21 of the UDHR can be found, apart from a generic mention of the CCPR and the ECHR. And even this is done under the title of 'universal principle'. Without opening the discussion about the legal value of the provisions of the UDHR, it is not understandable why international law and its legally binding provisions are almost ignored. This is surprising if one takes into consideration that the missions are organized and financed by international actors. It shows that actors within the international community are not making use of each other's work but are reinventing the wheel again and again.

There must not be any confusion about the legal value of internal guidelines of election observation missions and international treaties.<sup>234</sup> A

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parliament or other institutions. The second part of the principle, the accountability of the elected to the electorate, can be found in paragraph (a) of Article 25. Every citizen has the right to take part in public affairs directly or through freely chosen representatives. In the latter case, when this right is exercised through representatives, the representatives must assure that this right to participate is guaranteed through them. In this sense they are accountable to the electorate.

<sup>233</sup> G. H. Fox, 2000, p. 85.

<sup>234</sup> Fox refers to both as 'these sources of law'. *Ibid.*

careful analysis shows that the criteria employed by, for example, UN monitors are *not* on equal footing with international treaty law, even *if* one is willing to accept that these criteria can be classified as law.<sup>235</sup> Therefore, a clear hierarchy can be identified. International treaties ratified by states do have a much higher rank than the mentioned guidelines; this is a fact and must be taken into consideration. It is not possible to overcome the disregard of the existing treaty law through elevation of internal practices of an international organization to international law. It is the other way around, the internal practices must be carefully analysed and assessed through the treaty law and changed according to the treaty law if necessary.

Ignoring the provisions of the international treaties in the assessment of the elections in a given state also means that the state needs to respond to two separate sets of norms or rules. There are the obligations assumed under international human rights treaties and the need to respond to the various election observation missions, which use their own terminology and method. If the two sets differ in any point, the state needs to opt for one or the other. That means it violates its internationally assumed obligations or it has to face public criticism of the international election observation mission. The latter can have negative consequence on the internal level, as participants in the elections, such as voters and candidates, distrust the process, as well as on the external level when a smooth electoral process is a pre-condition for further international co-operation. A harmonization of the work of the bodies for treaty implementation seen in the previous section and the work of the election observation missions would solve this dilemma.

The advantages of using international law and the developed opinions for the election observation missions themselves are mainly two-fold. First, it would guarantee that election observation missions by various organizations use a common standard. Nothing is more harmful to the credibility of international organizations than the practice of a double standard. By including the same treaty provisions and the common understandings of the various bodies and institution into the handbooks, codes of conduct or guidelines of the different missions, these missions would dispose of a common reference. Whatever rules for the assessment of elections the missions subscribe to on the internal level, they could be traced back to legally binding treaty provisions. In this way a common standard can be achieved. The use of a common standard for election observation would also facilitate the co-operation between missions and it would improve consistency in the work of

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<sup>235</sup> For more on the character of internal acts of international organizations, see K. Ipsen, 1990, p. 216.

international organizations, although it would not solve all problems such as those pertaining to logistics and finances.

For organizations such as the United Nations or the Council of Europe the inclusion of the findings of the human rights bodies into the work of their election observation missions would also bring a greater internal coherence into the work of these organization.

The second advantage lies in the greater authority that the mission and its assessments of the electoral processes would gain. The mission would not only be based on the request of the state and the internal guidelines of the organization but also on the legal obligations of the state to run elections according to Article 25 of the CCPR and/or other provisions of international treaties which the state has ratified. Especially at the point when problems arise between the mission and the state where the mission is supposed to observe the elections, the mission could explain and justify their opinions on the electoral process by making reference to the relevant provisions of the treaties the state has ratified. In this way—besides the use of the findings of the international bodies in its proper meaning, that is, their inclusion in the daily work—the missions would be able to use such findings as a backup. The legal argument is helpful in the highly political context of elections and cuts down also discussions on the legitimacy of demands and calls on improvement of the electoral process the missions formulate during and after their presence in the state they work in. Having these advantages and the developed understanding of the different bodies and institutions in mind, it is not understandable why these are not used.

In conclusion, it is possible and preferable to include international human rights law and the developed understandings on it and to make it the central element of election observation missions. These missions should have as their basis the specific provisions of the international human rights treaties.



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