

ELECTION OBSERVATION AS AN INFORMAL MEANS OF ENFORCING POLITICAL RIGHTS

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***Abstract:** This article argues that election observation has evolved as an informal enforcement mechanism with respect to several articles contained in the International Covenant on Civil and Political Rights, especially Article 25. This informal function stems from the inadequate enforcement capacity of the Human Rights Committee and its limited means of sanction, coupled with the rise of election observation since the early 1990s. The rationale of election observation and its contentious nature are discussed. The criticisms levelled against this practice are highlighted. Notwithstanding this critique, the article concludes that election observation has contributed to the enforcement of election-related political rights. **Keywords:** Election observation, democratisation, political rights.*

Since the end of the Cold War, election observation has grown into a veritable industry as democratisation has spread, above all in the Balkans, the former Soviet Union and the developing world. This article applies a human rights perspective to election observation. It argues that this practice is, in effect, an informal extension of the enforcement mechanisms of the international human rights regime with regard to selected political and civil rights. Election observation is defined as the purposeful gathering of information regarding an electoral process, and the making of informed judgements on the conduct of such a process on the basis of the information collected, by persons who are not inherently authorised to intervene in the process, and whose involvement in mediation or technical assistance activities should not be such as to jeopardise their main observation responsibilities.¹ It is further argued that election observation as a vehicle of enforcement depends for success on its quality and credibility. Evidence is drawn from secondary sources and the author's personal experiences as an election observer – with a bias towards Africa – to show that experiences with electoral observation

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¹ International IDEA: *Glossary of Electoral and Related Terms (draft)*, (Stockholm: International IDEA) (http://www.idea.int/publications/ace/electoral_glossary.htm) (downloaded on 21 November 2003).

throughout the 1990s to date leave a lot to be desired when judged against established standards. Improvements have been noted, however.

The first part of this article (part A) sets out the points of departure in the International Covenant on Civil and Political Rights and the further specification of the right to vote and to be elected in General Comment No. 25 of the Human Rights Committee. The next part (part B) looks at the available means of enforcement through the appropriate oversight body; election observation as a complementary informal means of enforcement; and the emergence and rationale of election observation. The third part (part C) discusses the criticisms of election observation practices. The final part pulls together the threads in a conclusion.

A. THE RIGHT TO TAKE PART IN PUBLIC AFFAIRS

Free and fair elections at regular intervals form the core of a democratic system of governance.² With few exceptions, however, this prerequisite does not refer explicitly to the international human rights instruments as its foundation, *in casu* the 1966 International Covenant on Civil and Political Rights (ICCPR).³ Article 25 sets out the right of every citizen to vote and to be elected:

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 United Nations Human Rights Committee, which oversees the implementation of the ICCPR, issued in 1996 an authoritative interpretation of Article 25 in General Comment No. 25 (GC25).⁴ Although not legally binding on the signatories to the Covenant, the GC serves as a clear and strong guideline with respect to what restrictions may or may not be introduced, as well as to the associated freedoms (expression, movement and association) that need to be adhered to for elections to be meaningful. Accession to and ratification of the Covenant and, by implication, the acceptance of the said GC, requires the signatories to enact

² In the vast body of literature on democratic governance, see *inter alia* the seminal works of Robert A. Dahl: *Polyarchy: Participation and Opposition*, (New Haven, CT: Yale University Press 1971), and *Democracy and Its Critics* (New Haven, CT: Yale University Press 1989).

³ David Beetham: *Democracy and Human Rights* (London: Polity Press 1999).

⁴ General Comment No. 25 (57): Article 25 ICCPR (1510th meeting, 57th Session, 12 July 1996) [UN Doc. CCPR/C/21/Rev.1/Add. 7] (visited 17 November 2003) ([http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument)).

national legislation to ensure that their citizens enjoy the stipulated rights regardless of constitutional form.⁵

The GC reiterates that the right to vote and to be elected lies at the core of democratic governance based on the consent of the people. It underscores that this is a right to be enjoyed by *every* citizen and that no distinctions are permitted between citizens in the enjoyment of these rights. Furthermore, the GC expounds on the principle of accountability of elected representatives through recall at periodic elections and that effective positive steps must be taken to ensure that all persons entitled to vote are in fact able to exercise that right. Moreover, mention is made of the right of voters to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference. To supervise and to ensure that the electoral process is conducted fairly and impartially an independent electoral authority should be established.

The principle of one person, one vote must apply, and within the framework of each state party's electoral system, the vote of one elector should be equal to the vote of another. The qualification in this sentence does open for some discretion and a certain differential weighing of votes. For instance, it is well known that not all elected representatives have an equal number of votes behind them. In some countries this occurs by design in that, say, votes in rural areas are given more weight than their urban counterparts because the former tend otherwise to be disadvantaged. As long as such arrangements are reasonable and reflect a broad consensus they are permissible. However, so-called gerrymandering is ruled out categorically as an unfair practice. 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.

Finally, GC25 highlights the importance of the free flow of information and ideas. This implies a free press and other mass media, able to comment on public issues without censorship or restraint and to inform public opinion. It also includes freedom to engage in political activity individually or through political parties and other organisations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticise and oppose, to publish political material, to campaign for election and to advertise political ideas.

All in all, the GC sums up and covers very well the international consensus in general terms about the definition of elections and the principles for their proper conduct, yet allowing some scope for variation with regard to electoral laws on the technical aspects of elections and systems of political representation.

B. MEANS OF ENFORCEMENT

Since the adoption of the Universal Declaration of Human Rights in 1948 the international community has worked steadfastly towards expanding the range of human rights instruments

⁵ It is acknowledged that the mere accession to a convention does not render it a source of law in the domestic legal system without subsequent ratification (which typically takes a long time) – regardless of the mode of integration into domestic law. However, even short of ratification the political impact of accession is significant and is likely to bear on electoral behaviour.

and to specifying them in new substantive fields. In this endeavour the predominant focus has been the establishment of international consensus on legal norms. Gradually, as state parties have ratified them a series of legally binding treaties have come into force.

1. THE HUMAN RIGHTS COMMITTEE

The Human Rights Committee (HRC) is the international treaty charged with overseeing and enforcing the ICCPR. All signatories are required to report to the Committee on their progress towards fulfilling the obligations that accession entails. In the event any signatory fails to submit reports to the Committee's satisfaction the matter may be raised and deliberated upon openly. This 'naming and shaming' strategy might, given time and political pressure, prompt the embarrassed countries to co-operate and comply with the dictates of the treaty in question. Similarly, on occasion, the Committee may on its own initiative, or at the request of another signatory, call upon a state party to respond to a specific complaint.

The Optional Protocol to the Covenant also provides for individual complaints. Since 1977 the HRC has received 40 complaints with respect to various sub-sections of Article 25 of the ICCPR, of which 20 were dismissed on grounds of inadmissibility or the merits of the case. In the remaining 20 cases the Committee found that violations had been revealed and in those cases the Committee suggested remedies to be made. The state parties found to be in violation include Belarus, Cameroon, Colombia, Democratic Republic of Congo, Slovakia, Latvia, Namibia, Peru, Togo, Uruguay, Zaïre, and Zambia.⁶

Beyond the reporting procedures and naming and shaming, the HRC has no means of sanction at its disposal. As a result, some signatories culpable of human rights violations continue to defy the Committee's instructions. It is only the Security Council acting on Chapter VII of the UN Charter that may impose sanctions (selective or comprehensive) on an errant state party, but only if the Council has deemed such behaviour a threat to international peace and security.⁷

A key enforcement element is the integration into domestic law of international instruments such as the ICCPR. Many national constitutions comprise fully-fledged Bills of Rights but by no means all.⁸ For the purpose of enforcement, therefore, integration of international human rights instruments into domestic law is paramount. The mode of integration, however, is significant because it bears on the domestic administration of justice and the commitment of signatories to the Conventions.⁹

⁶ See the database of the Netherlands Institute of Human Rights at <http://sim.law.uu.nl/sim/Dochome.nsf>. I am grateful to Martin Scheinin for drawing my attention to this valuable database.

⁷ See Arne Tostensen and Beate Bull: "Are Smart Sanctions Feasible?" (2002) 54 *World Politics* 373.

⁸ See, among others, Abdullahi Ahmed An-Na'im (ed.): *Human Rights under African Constitutions: Realizing the Promise for Ourselves* (Philadelphia: University of Pennsylvania Press 2003); Philip Alston (ed.): *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (Oxford: Oxford University Press 1999).

⁹ For a concise account of different modes of integration, see Arne Tostensen and Frederik Grünfeld, *Options and Trade-offs: Means and Measures in the Implementation of Norwegian Human Rights Policy*, Studies on Foreign Policy Issues Report 4:99, (Oslo: Ministry of Foreign Affairs 1999) 81–85.

2. ELECTION OBSERVATION AS A COMPLEMENTARY INFORMAL MEANS

Notwithstanding the establishment of the treaty bodies to oversee the implementation of the treaties, as well as the attendant means of enforcement at the national level, the relative neglect of enforcement mechanisms has become an increasingly pressing problem.

In view of its lack of capacity, if not its lack of authority, the HRC has, by default, allowed other actors to fill the gaps it has failed to fill adequately. Arguably, election observation falls within the realm of informal enforcement mechanisms, specifically regarding the enforcement of Article 25 of the ICCPR. However, GC25 does not offer specific guidance on the ‘nuts and bolts’ of election observation. It only expounds – and in some detail – on the principles of the electoral institution. This is helpful, of course, but further practical guidelines are required.

Election observation is not officially sanctioned by the Committee, but many state parties have taken part in or financed election observation missions – individually or collectively through inter-state organisations. As such it has become a commonly accepted practice and taken on an informal enforcement function. A number of international organisations have engaged in election observation activities, offered technical assistance and produced ethical guidelines and codes of conduct for observers as well as detailed guidelines.¹⁰ Some of them have also organised observer missions in a multitude of countries. The most prominent among these include the Organisation for Security and Co-operation in Europe, the Commonwealth Secretariat, the European Union, the Southern African Development Community, the Electoral Institute of Southern Africa, the International Institute for Democracy and Electoral Assistance, the International Foundation for Electoral Systems, and the United Nations.

3. THE EMERGENCE AND RATIONALE OF ELECTION OBSERVATION

In addition to the HRC’s inadequate enforcement capacity, two main factors may explain the phenomenal increase in international election observation missions.

First, the modification of the concept of intervention has meant that election observation or provision of technical assistance on election-related matters is no longer considered an infringement of the national sovereignty of a particular state or interference in a country’s internal affairs, and more particularly, in its political reform processes.¹¹ One of the precon-

¹⁰ See, *inter alia*, Arne Tostensen, Doeke Faber and Karij de Jong: *Towards an Integrated Approach to Election Observation? Professionalising European Long-Term Election Observation Missions* (Maastricht: European Centre for Development Policy Management 1997); International IDEA: *International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections* (Stockholm: International IDEA 2002); Organisation for Security and Co-operation in Europe: *The ODIHR Election Observation Handbook* (4th ed, Warsaw: OSCE/Office for Democratic Institutions and Human Rights 1999); European Union: *Handbook for European Union Election Observation Missions* (Brussels: European Union 2002); Electoral Commissions Forum of SADC Countries and Electoral Institute of Southern Africa: *Principles for Election Management, Monitoring, and Observation in the SADC Region* (Benoni: ECF and EISA 2003).

¹¹ A general argument to this effect is found in Peter R. Baehr and Leon Gordenker: *The United Nations in the 1990s* (London: Macmillan 1994).

ditions for election observation missions is that they take place on the basis of a formal invitation by the government concerned. Furthermore, election observation will only take place in countries which have acceded to the various international human rights instruments, all of which, except the African Charter on Human and Peoples' Rights, refer explicitly to the holding of free and fair elections. This legitimises and justifies comments on the electoral process and does not constitute interference in breach of the principle of non-intervention.

International election observation has often been resented by incumbent regimes which tended to see this practice as an encroachment on their national sovereignty. It was admissible only in cases of decolonisation, e.g. Zimbabwe in 1980 and Namibia in 1989. This stance has gradually given way to a view that election observation is a legitimate pursuit, indeed a duty of the international community in the interest of democratisation worldwide and observance of political rights, provided certain preconditions are met.

Second, the geo-political situation after the end of the Cold War motivated the international donor community to include more political conditions in their foreign assistance policies.¹² Explicitly or implicitly, donors imposed conditionalities related to the protection and promotion of human rights, democracy and aspects of 'good governance'. This also encompassed the rights of political participation and competition for state power through regular, free and fair elections which serve to legitimise governmental authority.

The need for election observation arose in the context of certain situations which called for impartial judgement of electoral processes. Due to internal strife and tension, indigenous populations tended to question the impartiality of the electoral authorities of their respective countries – referred to in GC25 – and the international community felt a responsibility to assist in overseeing the proper conduct of elections in accordance with international standards.

One may distinguish between four categories of situation where election observation is seen as particularly relevant. These are not discrete categories, however; in real life a mix of situations will be encountered: (1) the emergence of new state formations, resulting either from decolonisation, secession or from the dissolution of federations; (2) the reconstitution of war-torn societies after protracted internal conflict or civil war; (3) transition from long-standing authoritarian rule to a democratic system of governance; and (4) recovery from serious internal tension towards a more stable situation.

There is general agreement that the overriding objective of election observation is three-fold: (a) legitimisation or de-legitimation of the electoral process, as the case may warrant; (b) improvement of the conduct of elections (observation mission reports often contain recommendations);¹³ and (c) ultimately making election observation superfluous by creating local capacity and nurturing a democratic political culture.

These overarching goals may, in turn, be sub-divided into more specific objectives or functions: (i) to serve as a neutral witness expressing the international community's interest in and support for the democratic process; (ii) to detect and expose fraud and irregularities; (iii) to assess the relative legitimacy of an electoral process and outcome in accordance with interna-

¹² See, for instance, Olav Stokke (ed.): *Aid and Political Conditionality* (London: Frank Cass 1995).

¹³ See, for example, OSCE/ODIHR: *Republic of Croatia Parliamentary Elections 23 November 2003. Election Observation Mission Report* (Warsaw: OSCE/ODIHR 2004).

tionally accepted standards; (iv) to enhance the respect for political, civil and other fundamental election-related human rights in accordance with the principles and obligations set forth in international law; (v) to raise public confidence in the election process, provided it is deemed free and fair; (vi) to act as an informal enforcement agency in respect of election-related political rights; (vii) to make an official public assessment of the election and offer suggestions for improving the electoral process in the future; and (viii) to encourage political contestants to accept the results of a electoral process, provided it is considered free and fair or to recommend an alternative course of action if it is deemed seriously flawed or fraudulent.¹⁴

There is some disagreement, however, whether election observation ought to contribute to conflict resolution as well. The view is widely held that election observation can only legitimise or de-legitimise an electoral process, but cannot address the very causes of the conflict that played themselves out prior to the elections. If one or more of the parties are unwilling to accept the outcome and choose to revert to armed struggle there is little observation missions can do to prevent it. "Foreign observers cannot force profoundly polarised political factions to co-operate with one another."¹⁵

The problems of credibility and degree of interference are closely related to the standards applied. When countries emerging from colonial rule, protracted civil war or entrenched authoritarianism are organising multi-party elections, it is tempting for election observation missions to contextualise the elections to such a degree that the internationally accepted standards are compromised, thus, in effect, applying double standards to the task at hand. It must be stated categorically that the standards against which performance is to be judged with respect to the free and fair conduct of elections are the same in established democracies as in those emerging from autocracy. There cannot be different criteria for first and second-class democracies.

Having established that benchmark, it should be noted, however, that the democratisation process has a time dimension and that the concept of democracy is not dichotomous. No system of governance is either fully democratic or totally autocratic at a particular point in time. Systems of governance are more or less democratic. The democratisation process is unfolding continuously, involving the pursuit of increasingly more popular participation in decision-making, progressively fairer and more transparent political competition for votes, and increasingly greater respect for fundamental political rights. Systems of governance are thus always *en route*.

Recognising that democratisation means an evolution towards ever more democratic practices implies that the criteria for accepting an election as 'free and fair' are somewhat elastic. The *direction* of movement is important, however. Even if an election is neither entirely free nor completely fair, it may still represent a 'significant step towards democracy'.¹⁶ Conversely, it may not facilitate further democratisation to declare an election null and void

¹⁴ Adapted from the UN Electoral Assistance Division as reproduced in Stefan Mair: *Election Observation: Roles and Responsibilities of Long-Term Election Observers*, ECDPM Working Paper No. 22 (Maastricht: European Centre for Development Policy Management 1997).

¹⁵ Thomas Carothers: "The Observers Observed" (1997) 8 *Journal of Democracy* 17, 21.

¹⁶ The qualifying phraseology varies: "[substantially] free and fair"; "[accurately] reflecting the will of the [majority of the] people"; "free, secret, universal and direct"; "a [significant and positive] step forward in terms of the country's progress towards [sustainable] democracy".

because of many irregularities if it is still judged to be on the whole reflective of the will of the people.

This does not mean that everything is relative, that democracy is a rubber-band concept. It simply means that there must be some exercise of discretion in applying a uniform set of standards – whatever they might be – depending on the circumstances and context in which the elections have been held. It is acknowledged, of course, that the scope for discretion should not be too wide, and that the exercise of discretion is a minefield of controversy. On the other hand, there is no escaping discretionary judgement. They cannot be based exclusively on facts. In real life the conduct of elections is rarely (probably never) either entirely free and fair, or the opposite – painted in black or white. Election observers should be conscious of the fact that shades of grey are more apt descriptions.

The OSCE/ODIHR handbook on election observation splits the notion of free and fair into several key words or principles to denote various aspects of an election: universal; equal; fair; secret; free; transparent; and accountable.¹⁷ Although this refinement represents a step forward the task of making a just assessment remains difficult. For instance, in the 2004 Russian presidential election the joint statement of the Parliamentary Assembly of the Council of Europe and the OSCE/ODIHR acknowledged the professionalism with which the elections were conducted – with reference to the universality, equality, secrecy and freedom of the elections – but deplored the biased reporting of the state-controlled mass media, which had compromised the fairness of the election process.¹⁸

Conceptually distinct yet inextricably linked to election observation and the broader endeavour of democratisation are various forms of electoral assistance of which one may distinguish seven types. The United Nations typically takes the lead in such activities, although the OSCE and the EU also engage in such endeavours. Not all of them entail election observation in a limited sense, but three of them comprise a strong international observer component. Unfortunately, electoral assistance and election observation are not always kept separate. Indeed, it is not even unequivocally clear which is which. As a result, the issues are obfuscated, roles are confused, and conflicts of interest arise. If international agencies get deeply involved in the actual management of elections they should not pretend to assume an impartial observer role at the same time. Nevertheless, this occurs not infrequently and has become a source of criticism.

- *Organisation and conduct of elections.* In such cases the UN is mandated to organise and administer the elections and thus, in effect, performs the function of an independent electoral authority. This was the case in Cambodia (1993), Bosnia and Herzegovina (1996 and 1998), and East Timor (1999).

¹⁷ Organisation for Security and Co-operation in Europe: *The ODIHR Election Observation Handbook*, Fourth Edition (Warsaw: OSCE/Office for Democratic Institutions and Human Rights 1999).

¹⁸ OSCE/ODIHR and Parliamentary Assembly of the Council of Europe: *Russian Federation Presidential Election 14 March 2004. International Election Observation Mission. Statement of Preliminary Findings and Conclusions.*

- *Supervision.* This implies that the UN is responsible for supervising the elections, short of organising and administering them. This instrument has mainly been used in situations of decolonisation and emergence from violent conflict. The only recent example of decolonisation is Namibia (1989), whereas Bosnia and Herzegovina (1996) emerged from deep-seated conflict.
- *Verification.* In these cases the elections are organised and administered by the respective national electoral commissions. The role of the UN is limited to monitoring closely the electoral process and to verify its outcome over an extended period of time (6 months or more). Such missions are as a rule linked to peace-keeping operations. Exceptions to this rule include Nicaragua (1989), Eritrea (1992) and South Africa (1994).
- *Co-ordination and support of international observers.* In responding to member state requests to observe elections, the United Nations has increasingly opted for a type of electoral assistance referred to as co-ordination and support of international observers. No mandate is required from the General Assembly or the Security Council to establish such an operation. This approach is most commonly used in cases where several governments and international non-governmental organisations have been invited to observe an electoral process. While the UN is not in a position to verify an election without a mandate from the Security Council or the General Assembly, it can provide expertise and logistical support to international observers through this assistance mechanism (see example below where another model of co-ordination was adopted).
- *Training of domestic monitors.* The objective is to enable the domestic monitors to play an effective role in the electoral process. Many organisations contribute towards the same end. This approach was first used in Mexico (1994).
- *Technical assistance.* Technical experts of various categories are sent by various organisations to assist the national electoral commissions in preparing and organising elections.
- *Following and reporting.* In this instance the UN's role is very limited. The task is given to the UN resident representative in the relevant host country to follow an election and to report on it to the UN. This 'safety-belt method' is commonly used when the preconditions for sending observers are not met by the requesting government.

Decisions regarding type and scope of intervention are based less on the political context of a given election than on the political importance attributed to the election or to the country in which the election takes place. This priority is borne out by a glance at the list of countries in which the largest, most ambitious and most costly observer groups have been deployed: Namibia, Nicaragua, Haiti, Angola, Eritrea, Cambodia, South Africa, Mozambique, Palestine and Bosnia-Herzegovina. In South Africa and Namibia international election observation was intended to contribute to the healing of one of the deepest wounds in the international political system: *apartheid* and defiance by the South African *apartheid* regime over its illegal occupation of Namibia.

The considerable international engagement in Haiti and Nicaragua was caused by the prominence these small countries had gained in the internal political debate of the United States. Similarly, the EU decision to get deeply involved in the Palestinian election and the UN involvement in the elections of the remaining countries listed above, were based on the hope that elections would help end protracted civil wars which had been destabilising the respective

regions and even the international system.¹⁹ Thus, the fact that the above elections took place at the end of civil wars was not decisive for the commitment of the UN and the EU but rather the international repercussions of these civil wars. This partly explains why the engagement of both organisations in the post-war elections in El Salvador, Guatemala and Sierra Leone was less significant.

C. CRITICISM OF ELECTION OBSERVATION PRACTICES

Consensus at the general policy level among the major organisations engaged in election observation does not necessarily mean uniformity of approach and operational practice at the level of implementation. Nor does it follow that election observation is beyond reproach. The exercise is compounded by diversity of situations, the mix of electoral assistance and observation functions, and the elasticity of standards. As a result, the inevitable exercise of discretion inherent in election observation and the informal nature of this means of political rights enforcement make it prone to dispute, especially in terms of politicisation and ulterior motives on the part of the actors involved. Consequently, the election observation ‘industry’ is surrounded by controversy, not least owing to the great diversity of actors and stakeholders involved.

Over the years a body of literature has accumulated on the results of specific observation missions – the bulk of it in the form of reports submitted to the sponsoring organisations.²⁰ Very few of them problematise the practice and systematically question its credibility. The academic literature has also grown, most of it dealing with experiences of specific elections within the context of democratisation broadly speaking but also covering aspects of election observation.²¹ Other works discuss the challenges involved in election observation.²² But the definitive work on election observation is yet to be written.

¹⁹ The relationship between peace and democracy is contested, especially the effects of electoral processes on war-torn societies. Democratic openings involving inter-party contestation may prove, in effect, to be a Pandora’s box, reinforcing wartime divisions and leading to the resurgence of hostilities. Others see elections as an effective device for preventing and resolving armed conflicts. They argue that, in terms of cost effectiveness, let alone the human suffering involved, electoral assistance is preferable to humanitarian and military operations to re-establish and maintain peace.

²⁰ See the websites of the relevant organisations mentioned above.

²¹ See, e.g., Martin Ott, Kings M. Phiri and Nandini Patel: *Malawi’s Second Democratic Elections: Process, Problems, and Prospects* (Blantyre: Kachere Books 2000); Michael Cowen and Liisa Laakso (eds): *Multi-Party Elections in Africa* (Oxford: James Currey 2002); Marcel Rutten, Alamin Mazrui and Francois Grignon (eds): *Out for the Count: The 1997 General Elections and Prospects for Democracy in Kenya* (Kampala: Fountain Publishers 2001).

²² Eric Bjornlund, Michael Bratton and Clark Gibson: “Observing Multiparty Elections in Africa: Lessons from Zambia” (1992) 91 *African Affairs* 405; Gisela Geisler: “Fair? What Has Fairness Got to Do with It? Vagaries of Election Observation and Democratic Standards” (1993) 31 *Journal of Modern African Studies* 613; Thomas Carothers: “The Observers Observed” (1997) 8 *Journal of Democracy* 17; Jørgen Elklit and Palle Svensson: “What Makes Elections Free and Fair?” (1997) 8 *Journal of*

In the course of the 1990s experiences have been garnered and lessons learnt. As a result, the criteria for judging the freedom and fairness of an election have become clearer and codes of conduct for the ethical and professional conduct of observers have been elaborated.²³ Despite the observers' learning capability, many of the inherent structural constraints remain. It is paramount, therefore, that election observation activities be scrutinised to determine the degree to which there is a discrepancy between agreed standards and actual practice. The greater the discrepancy, the lower the credibility of observers as arbiters and enforcement agents of political rights.

The first challenge is the *duration* of observation. For too long attention was centred on a relatively brief period on and around polling day – typically one week or less. The notion that electoral fraud is most likely to occur during the polling and counting stages has been tenacious. Hence, critical phases in the electoral cycle were neglected, such as assessment of electoral laws, constituency delineation, voter registration, civic and voter education, political campaigning, mass media coverage, etc. For instance, it has often been noted that scores of young voters have effectively been disenfranchised due to faulty voter registration procedures. Similarly, opportunities for 'ballot stuffing' have arisen because large numbers of elderly voters on the electoral rolls are in fact deceased. Consequently, what transpires on polling day does not necessarily serve to expose possible electoral malpractices.

In recent years, however, most missions have included both long-term and short-term observers to meet that criticism and a third category of medium-term observers (with a field sojourn of about two weeks) has been introduced. There is no doubt that far greater attention has been paid to the pre-polling phases in recent years. But generally the number of long-term observers has remained too small to address the problem adequately. Other remedial measures might be the inclusion of country experts who are thoroughly familiar with local conditions. The interaction between long-term and short-term observers is sometimes problematic and may cause tension. Based on their deep qualitative knowledge, long-term observers tend to be disdainful of the allegedly glib observations of short-term observers who apply a quantitative approach based on standardised forms to be filled in for the purpose of judging the technical execution of elections. Reconciling these differing perspectives represents a challenge.

The second challenge is *geographical coverage*. Even in small countries the ratio of election observers to the number of polling stations is too low for generalisation of findings. Too often there is a concentration of observers in the capital city and other major urban areas which are easily accessible. Even deployment is rarely feasible in densely and sparsely populated areas. There may, in fact, be a case for uneven deployment on three grounds. More observers in urban areas do make sense because more voters live there and, if successful, rigging is more

Democracy 32; Neil Nevitte and Santiago A. Canton: "The Role of Domestic Observers" (1997) 8 *Journal of Democracy* 47; Jon Abbink and Gerti Hesselting (eds): *Election Observation and Democratisation in Africa* (London: Macmillan 2000).

²³ Examples include International IDEA: *Code of Conduct for the Ethical and Professional Administration of Elections* (Stockholm: International IDEA 1997); International IDEA: *Code of Conduct for the Ethical and Professional Observation of Elections* (Stockholm: International IDEA 1997).

likely to seriously affect the election result. Furthermore, urban areas are often hotbeds of political contestation where the temptation to cheat is correspondingly strong. The presence of election observers could act as a deterrent to rigging. Similarly, a greater concentration of observers in hot spots – whether rural or urban – could be justified for the same reason. Even so, leaving large tracts of a country empty of election observers – e.g. the heartlands of the incumbent party – would give fraudulent authorities the opportunity to work in peace with their schemes, with the potential to distort the election outcome significantly. The coverage problem is largely one of cost. Election observation is costly. The greater the number of observers, the higher the cost – and doubly so if the mission includes long-term observers. Correspondingly, the logistical costs rise with wider geographical coverage.

The great range of coverage may be illustrated respectively by the 2002 parliamentary election in the Former Yugoslav Republic of Macedonia and the 2004 general elections in Indonesia. In the former case about 850 international observers paid some 3,600 visits to 2,500 of the 2,973 polling stations throughout the country.²⁴ In other words, 84 per cent of the polling stations were covered. In populous Indonesia, at the other extreme, with more than 147 million registered voters and some 585,000 polling stations, the international observers (predominantly from the EU and Australia) managed to cover perhaps 2,000 polling stations throughout the country, or a mere 0.3 per cent of the total.²⁵

A third challenge concerns the *professionalism* of the election observers themselves or their lack of such. The short-term election observers, in particular, have been accused of ‘electoral tourism’.²⁶ It has been alleged that they are ignorant of electoral procedures and oblivious of local conditions, not even interested in the electoral outcome, only their short sojourn in an exotic foreign land. Over the years, however, the selection procedures have become more effective in ensuring that ‘political tourists’ do not pass the screening. Although some ‘political tourists’ may occasionally still be found among observers, they are probably fewer than claimed.

Beyond the questionable ethical stature of some observers, the more serious side of professionalism, which still needs addressing, is the observers’ limited knowledge of the societal context in which they operate. Even if observers are thoroughly conversant with the procedures and mechanics of polling, electoral fraud may be difficult to detect in the absence of deep knowledge of the country concerned. This knowledge deficit can probably never be remedied completely, because missions are mounted in very diverse countries where international specialists with country-specific knowledge are in short supply. Still, considerable improvements

²⁴ See OSCE/ODIHR: *Former Yugoslav Republic of Macedonia. Parliamentary Elections 15 September 2002. OSCE/ODIHR Election Observation Mission. Final Report*, (Warsaw: OSCE/ODIHR 2002). Downloaded from the Internet at http://www.osce.org/documents/odihr/2002/11/1404_en.pdf; and Nils Gunnar Songstad: *Former Yugoslav Republic of Macedonia: Parliamentary Elections 2002*. NORDEM Report 10/2002 available from the Internet at http://www.humanrights.uio.no/forskning/publ/nr/2002/10/nordem_report.html.

²⁵ See European Union Election Observation Mission to Indonesia General Elections 2004: *Preliminary Statement: Peaceful and Democratic Elections Despite Administrative Shortcomings* (Jakarta: European Union 2004); European Union Election Observation Mission: *Long-Term Observer Reference Manual: Indonesian General Elections 2004*.

can be made through training programmes before deployment and in the field, even though the cost implications remain a constraining factor.

The knowledge shortfall is aggravated by the many 'invisible' phenomena which tend to escape international observers, precisely because of the latter's superficial familiarity with local conditions. Election observation is focused on the formalities of the electoral institution, before, during and after voting. The critical issue of *political culture* has been seriously neglected and is still being neglected as a key factor in determining the election result. Voter attitudes and culturally determined perceptions of authority underlie polling behaviour. Unless the observers possess some knowledge of the prevailing political culture the election may be misjudged. With reference to Malawi, election observation was criticised for failing to pay adequate attention to 'secret worlds' and local political culture which allowed stakeholders to sway or intimidate voters.²⁷ But observers responsible for uncovering intimidation often fail to do so because their lack of deep cultural knowledge renders these phenomena 'invisible' to them.

The challenges of duration and geographical coverage can to some extent be offset by better *co-ordination* between multiple international observer missions operating simultaneously to watch the same election. Co-ordination means the avoidance of duplication of effort and the pooling of resources in terms of personnel and logistics, which would go some way towards longer duration and better geographical coverage of the observation endeavour. Above all, close co-ordination could forestall the eventuality of diverging evaluative post-election statements. Most donors agree that, in principle, co-ordination is desirable but rarely occurs in practice. Once co-ordination is mooted, a number of reservations tend to emerge, some of which are legitimate while others conceal political agendas. The larger donors tend to want to go it alone. However, during the 1997 general elections in Kenya a model of co-ordination was adopted and could be emulated elsewhere.²⁸ The donor community established a small secretariat for co-ordination purposes, staffed with highly competent and experienced experts on election procedures and conditions in Kenya. Considerable success was achieved in passing a unified verdict of the elections, even though a struggle between various donors over its precise wording took place behind the scenes. Similarly, the 2002 general elections in Kenya also achieved a high degree of co-ordination among observer missions. But the Commonwealth was conspicuously missing in the list of co-ordinating observer missions contained in the final report of the European Union Election Observation Mission.²⁹

²⁶ Gisela Geisler: "Fair? What Has Fairness Got to Do with It? Vagaries of Election Observation and Democratic Standards" (1993) 31 *Journal of Modern African Studies* 613, 615; and Thomas Carothers: "The Observers Observed" (1997) 8 *Journal of Democracy* 17, 21–22.

²⁷ Rijk van Dijk: "Secret Worlds, Democratisation and Election Observation in Malawi", in Jon Abbink and Gerti Hesselting (eds): *Election Observation and Democratisation in Africa* (London: Macmillan 2000) 180.

²⁸ For details, see Marcel Rutten: "The Kenyan General Elections of 1997: Implementing a New Model for International Election Observation in Africa", in Jon Abbink and Gerti Hesselting (eds): *Election Observation and Democratisation in Africa* (London: Macmillan 2000), 295.

²⁹ European Union Election Observations Mission: *Kenya General Elections 27 December 2002. Final Report* (Brussels: European Union 2003).

Whereas the virtues of co-ordination of international observer missions are often extolled, less attention has been paid to the *interface between domestic monitors and foreign observers*.³⁰ If inter-donor co-ordination is awkward, it has proved far more troublesome across the foreign–domestic divide. Generally, international observer teams are inclined to distrust domestic monitors because the latter are not considered entirely non-partisan. The alleged predispositions of domestic monitors are thought to colour their perceptions of ‘fair play’ and thus compromise the credibility of the observation effort.³¹ While there might be a grain of truth in this charge, the international observers are likewise influenced by their political and cultural baggage. The unrivalled advantage of domestic monitors is two-fold: (a) their sheer number mobilised by civil society organisations which allows for extensive geographical coverage far beyond the capacity of foreign observers; (b) their deep knowledge of local conditions which provides a sort of *Fingerspitzengefühl* for what transpires at the grassroots. A very strong case can be made, therefore, for complementary efforts and close liaison by foreign observers and domestic monitors. However, given the tension that often beset North-South partnerships, the interface is unlikely to be without friction.³² An exception might be the 2003 Croatian election when international organisations sent only long-term observers while relying on trusted domestic short-term monitors to observe and report on the polling.

The most damning criticism of election observation has to do with *post-election statements*, particularly if contradictory judgments are made of the observed election. Part of the problem might be related to poor co-ordination among the observer missions. But it could equally well emanate from the international observer groups’ underlying political motives that could lead to assessments ranging from the positive to the very critical. For example, in 2002 the official SADC observer group essentially gave the Zimbabwean presidential elections a clean bill of health, while that of SADC parliamentarians was highly critical.

International observer missions often tend to be more lenient than domestic monitors. This difference does not necessarily reflect the application of double standards. Rather, foreign missions tend to take a broader view, often related to the danger of violent conflict in the country that just went through a highly competitive election. In a charged political atmosphere where accusations of electoral fraud abound the ultimate statement issued could be inflammatory either way. An accommodating assessment, despite widespread irregularities, could infuriate the losing opposition and lead to rioting and destabilisation of the country. Conversely, a critical judgement enumerating irregularities, declaring the election fraudulent and calling for a re-run, might lead to a relapse to authoritarianism. These are dilemmas out of which there is no easy escape.

³⁰ A distinction should be noted between ‘observation’ and ‘monitoring’. As distinct from observation as defined in the introduction, monitoring denotes activity which involves the authority to observe an electoral process *and* to intervene in the process if relevant laws or standard procedures are being violated or ignored. However, in actual practice the distinction is not always observed.

³¹ Neil Nevitte and Santiago A. Canton: “The Role of Domestic Observers” (1997) 8 *Journal of Democracy* 47, 50.

³² See the Zambian story by Eric Bjornlund, Michael Bratton and Clark Gibson: “Observing Multiparty Elections in Africa: Lessons from Zambia” (1992) 91 *African Affairs* 405.

Apart from political considerations, foreign observer missions are sometimes caught in a 'legitimation trap'. Their sheer presence in a country is likely to be perceived by the electorate as a form of advance legitimation, ostensibly because the pre-polling stages of the electoral process (voter registration, civic education, etc.) had provided a playing field level enough to suggest a fair process. In such a situation it might not be possible to de-legitimise the process after polling by issuing a statement listing extensive irregularities – as the case might be; the foreign mission might thus inadvertently have lent legitimacy to an election it did not really approve of.

When all is said and done, taking advantage of the elasticity of the notion of 'free and fair' may be appropriate – and justified – in such circumstances. It is warranted to quote Elklit and Svensson in this regard: "The phrase 'free and fair' cannot denote compliance with a fixed, universal standard of electoral competition: No such standards exist, and the complexity of the electoral process makes the notion of any simple formula unrealistic."³³ From the vantage point of domestic monitors, however, accommodating statements by international observers flying in the face of rampant fraud may be tantamount to betrayal.

D. CONCLUSION

An international consensus has emerged at the general level about the conduct of elections and the principles of election observation, as well as the increasing sophistication and refinement of election observation guidelines. However, these established principles and guidelines need to be operationalised in real situations; the proof of the pudding is in the eating and in that process difficult trade-offs arise.

Unless the main challenges of duration, coverage, professionalism, political culture, coordination and post-election statements are met, the credibility and legitimacy of election observation can be jeopardised and its status weakened as an informal enforcement mechanism of political rights. These suggestions for improving the practice of election observation are by no means controversial. All organisations involved in election observation subscribe to them and significant strides have been made towards implementing them.

In this context, however, it should be recalled that the election observation missions themselves are accountable to no one. However regrettable, once they have delivered their verdict and left the country in question they are not liable to sanction and cannot be brought to account by any domestic or international body for their actions or neglect.

Notwithstanding the persistent problems listed above, election observation practices *have* in fact improved since the early 1990s and contributed considerably to enforcing the right to take part in public affairs, to vote and to be elected to public office, as well as the attendant freedoms of expression, movement and association.

Still, these efforts have been uneven and continue to be erratic, owing to resource constraints. For example, whereas geographical coverage may be satisfactory in one case, it may be well under par in another. In turn, the erratic availability of resources may be related to political agendas. Diverging and shifting political agendas are a fact of life that one can never get rid of by streamlining the guidelines.

³³ Jørgen Elklit and Palle Svensson: "What Makes Elections Free and Fair?"