

ELECTION YEAR SUMMIT

International Election Law:

Lessons Taught and Lessons Learned

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Remedies in Election Disputes: The International Context

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The following discussion of remedies is based in part on a chapter we have submitted for an ABA publication edited by John Hardin Young, entitled **International Election Principles**. Chapter 12 of that book, *Effective, Timely, Appropriate, & Enforceable Remedies*, begins with the observation that when we talk about resolution of election disputes in the international context, applicable standards are rooted in a broad array of election-related rights, fundamental notions of due process of law and judicial independence. International election standards, principles, criteria and best practices have been developed and refined over that past several decades to promote transparency, credibility, and fairness in the electoral process, and increase the confidence and trust of the electorate in the electoral process and in those who administer it.

In short, international election standards and the remedies and mechanisms for resolving violations of those standards are, and should be, grounded on the rule of law.

The Rule of Law

Four basic principles have been identified as the benchmarks of the rule of law.

1. The government and its officials are accountable under the law.
2. The laws are clear, publicized, stable and fair, and protect fundamental rights.

3. The laws are enacted and enforced through a process that is accessible, fair and efficient.
4. Competent, independent and ethical law enforcement officials, attorneys, and judges who have adequate resources and reflect the makeup of the community they serve uphold the laws and provide access to justice.¹

These principles form the core of the World Jurist Project's "Rule of Law index" that will be used to assess a nation's adherence to the rule of law. The Index is an assessment tool that takes into account the diverse governing patterns in a given country, the gap between law and practice, and the role, if any, of informal systems of law, and in turn assesses how well that country is adhering to the Rule of Law. In other words, it measures how that country's legal system carries out the core functions on which the Rule of Law is based and how lawful and just that country's system of government is.² Through this assessment, detailed information can be provided "to governments and civil society organizations on how they can strengthen institutions of justice."³

Free and Fair Elections

Free and fair elections are an essential part of democracy. When election-related disputes arise before or after election day, those disputes must be resolved in a prompt and just manner. The right to resolve an election dispute is meaningless and hollow, however, in the absence of an independent judiciary that can assure due process of law through fair procedures, notice and an open forum in which the parties have an opportunity to be heard.

I. Determination of remedies

While the United Nations and other international organizations recognize the universal

¹ The World Justice Project, Four Universal Principles of the Rule of Law, www.worldjusticeproject.org, 2/15/08.

² ABA President Unveils New Index to Evaluate Nations' Adherence to Rule of Law Among Four Key Principles, ABA News Release, 3/18/08, at 2 http://www.abanet.org/abanet/media/release/news_release.cfm?releaseid+256

³ Id.

right of suffrage⁴, they have historically been very weak in any efforts to create uniform standards for international election law, especially regarding remedies. The UN delegates all responsibility to the Member States to ensure ways and means to facilitate popular participation in their electoral processes and will only offer electoral assistance to States upon their request.⁵ The UN's "hands off" policy is grounded in the right of people to determine methods of established institutions regarding electoral processes. There is no single model of democracy or of democratic institutions, and States are to ensure all the necessary mechanisms and means to facilitate full and effective positive participation in this process.⁶

A. Identifying the Specific Right Abridged

1. Respect sovereignty in international human rights

The rights of citizens to vote and to elect their representatives at periodic, genuine elections are internationally recognized human rights entailing the exercise of a number of fundamental rights and freedoms.⁷

All people who take part in the electoral process have the right to be free from discrimination based on political or other opinion, gender, race, color, ethnicity, language, religion, national or social origin, property, birth or other status, such as physical disability.

International election standards must respect the sovereignty of the country holding elections, the human rights of the people of the country, and the laws and national authorities of

⁴ See generally, Universal Declaration of Human Rights, Art 21; International Covenant on Civil and Political Rights, Art. 25; see also The Council of Europe Protocol 1 to the European Convention for the Protection of Human Rights, Fundamental Freedoms, Article 3, Paris, 20 March 1952; see also The Organization for Security and Cooperation in Europe (OSCE) Charter of Paris for a New Europe - CSCE Summit (21 November 1990); see also OSCE Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (29 June 1990), §§ 5-7.

⁵ G.A. Res. 147, U.N. GAOR, 60th Sess., (2005). "Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes"

⁶ *Id.*

⁷ *Code of Conduct for International Election Observers*, commemorated October 27, 2005 at the United Nations, New York, p. 1.

the host country, including its electoral bodies, and must be written in a manner that is consistent with respect for and promotion of human rights and fundamental freedoms.⁸

Article 25 of the International Covenant on Civil and Political Rights recognizes and protects the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected, and the right to have access to public service.⁹ Whatever form of constitution or government is in force, the Covenant requires States to adopt such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects.¹⁰ Article 25 lies at the core of democratic government based on the consent of the people in conformity with principles of the Covenant.¹¹

B. Identifying the nature of the procedures and processes in which the right was violated

1. Election Dispute Resolution Scheme

A suggested election dispute resolution scheme is in a table format, structured as follows:

1. Activity	2. Election Related Violations	3. Legal Provision	4. Defendant	5. Who Can Complain	6. Where	7. Deadline For Complaint	8. Deadline For Consideration	9. Appeal	10. Sanction
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- Columns one and two describe the type of category outlawed.
- Column three indicates which laws or codes refer to the election-related violation or activity or list it as an offence.
- Column four refers to the person or institutions likely to be accused.
- Column five refers to the interested party.
- Column six indicates the forum with jurisdiction over the violation.
- Columns seven and eight give the time limits imposed by law.

⁸ *Declaration Of Principles For International Election Observation*, commemorated October 27, 2005, at the United Nations, New York, p. 4, ¶ 9.

⁹ International Covenant on Civil and Political Rights, signed 16 December 1966, entered into force 23 March 1976, 999 UNTS 171.

¹⁰ *Id.*

¹¹ *Id.*

- Column nine described whether there is the possibility for an appeal by either party.
- Column ten indicates what the outcome of the guilty verdict could be and what the enforcement mechanisms are.

The table is then divided under the following row headings, to indicate roughly chronological phases of the elections:

A. Pre-election registration	
B. Election campaign	
C. Election day issues	
D. Post voting issues	
E. General issues	

This election dispute resolution scheme can assess if the given legal system contains the necessary provisions to uphold the core principles of election dispute resolution. For instance, the lack of an appeal provision would violate a State's commitments under a specific treaty or an organization's rules of which they are a member. Or, where there is no sanction foreseen, the possibility of enforcing a remedy in the case of a guilty verdict should be monitored. Finally, whether the provisions outlined are enforced or applied efficiently by the election commissions, courts and other institutions are separate questions which can only be addressed through analysis of the decisions and actions taken. However, this scheme can help establish a strategy to assess the ability of a legal system to resolve election disputes.

In many instances, election laws may be excluded from the table because there are no sanctions directly associated with violations in the election laws *per se*. The table may then refer to the provisions found in other laws, such as the criminal code or the criminal procedural code. As these provisions are not usually readily available in translation for every election observation mission, the scheme has been devised for easy consultation. However, the key provisions to

include in the actual table will invariably change according to the legislation of the country. Furthermore, it is not possible for the scheme to be exhaustive, but it is important that real election disputes are analyzed and that a comprehensive remedy is already outlined and in place.

C. Identifying and creating a process specific to electoral disputes

According to ODIHR (Office for Democratic Institutions and Human Rights) in its “Guidelines for Reviewing a Legal Framework for Elections”, the legal framework for international election standards should identify who is permitted to file complaints with election commissions or courts for electoral violations.¹² While minimum legal standards must be included in the legal framework, a country should be accorded flexibility to determine the legal structure of the system for resolving its electoral disputes.¹³ The decision of the court of last resort must also be issued promptly.¹⁴

According to the Complaints and Reviews Process of the ODIHR Election Observation Handbook¹⁵, the right to appeal to an independent, impartial national legal body must be ensured for all parties involved in the electoral process. All participating states in the OSCE have accepted as a confidence-building measure the presence of observers sent by participating States and representatives of non-governmental organizations and other interested persons at

¹² OSCE/ODIHR, *Guidelines for Reviewing a Legal Framework for Elections* (Warsaw, March 2001)(“Legal Review Guidelines”) p. 31.

¹³ OSCE/ODIHR, *Guidelines for Reviewing a Legal Framework for Elections* (Warsaw, March 2001)(“Legal Review Guidelines”) p. 31.

¹⁴ OSCE/ODIHR, *Guidelines for Reviewing a Legal Framework for Elections* (Warsaw, March 2001)(“Legal Review Guidelines”) p. 31.

¹⁵ The Organization for Security and Cooperation in Europe (OSCE) was founded in the early 1970s under the name of the Conference for Security and Cooperation in Europe (also known as the CSCE), a multilateral forum for dialogue and negotiation between East and West. The 1994 Budapest Summit, recognizing that the CSCE was no longer simply a Conference, changed its name to OSCE. Today the OSCE is comprised of many states from a region stretching from Vladivostok to Vancouver. The Office for Democratic Institutions and Human Rights (ODIHR) of the OSCE is located in Warsaw and is responsible for furthering human rights, democracy, and the rule of law throughout the OSCE region. It promotes democracy by observing elections, by offering technical assistance, by reviewing human rights and commitments, and by organizing international seminars in Warsaw and elsewhere in the region that addresses issues related to the human dimension of the OSCE.

proceedings before courts as provided for in international legislation and international law. It is understood that proceedings may only be held in camera in the circumstances prescribed by law and consistent with obligations under international law and international commitments.¹⁶

1. Deadlines

Reasonable deadlines must be included in the law for the consideration and determination of a complaint, some of which can be determined immediately, others in hours, and some days. Deadlines must allow for a degree of flexibility, taking into account the level of the election commission or court and the nature of the complaint.¹⁷

An expedited process should be provided for election complaints and appeals so that they can be resolved in a timely and effective manner.¹⁸

2. Powers of Election Consultants, Contestants, and Voters

Election consultants must be able to submit complaints concerning all aspects of election operations, to have their complaints heard by a competent administrative or judicial body, and to appeal to the relevant court.¹⁹

¹⁶ Document of the Second Conference on the Human Dimension of the CSCE (Copenhagen, 5 June - 29 July, 1990), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (“Copenhagen Document”), p. 12.

¹⁷ OSCE/ODIHR, *Guidelines for Reviewing a Legal Framework for Elections* (Warsaw, March 2001) (“Legal Review Guidelines”) p. 31.

¹⁸ See CDL Guidelines, II., 3.3; ACEEEO, 5(2.6); IPU, 4(9). The latter states: “States should ensure that violations of human rights and complaints relating to the electoral process are determined promptly within the time frame of the electoral process and secondly by an independent and impartial authority, such as an election commission or the courts.” See also Commonwealth of Independent States (CIS), Convention on Standards of Democratic Elections, Electoral Rights and Freedoms in the States-Participants of the Commonwealth of Independent States, signed 7 October 2002, not yet in force (three ratifications required) (unofficial translation) (“CIS Electoral Convention”), 10(4)(f)(complaint and appeal procedure should be “quick and effective.” See, generally, ODIHR, “Election Dispute Report.”

¹⁹ European Commission for Democracy Through Law (CDL or Venice commission), *Code of Good Practice in Electoral Matters, Guidelines and Explanatory Report*, adopted 18-19 October 2002 (CDL Guidelines”) 3.3; OSCE/ODIHR, *Resolving Election Disputes in the OSCE Area: Towards a Standard Election Dispute Monitoring System*, XIV. (Warsaw, 2000) (“”); Association of European Election Officials (ACEEEO), 4(6), 5(2.6), 18. The CDL Guidelines, *Id.*, state: “d. The appeal body must have authority in particular over such matters as the right to vote - including electoral registers - and eligibility, the validity of candidatures, proper observance of election campaign rules and the outcome of the elections.”

Voters must be able to have appellate access to review claimed violation of their suffrage rights, including voter registration.²⁰

Based on international law and OSCE commitments, election contestants must have the ability to submit complaints against election arrangements that affect them adversely and must have the right to appeal to court if necessary. Voters must have the right to protect their suffrage rights in similar ways.

3. Complaints Procedure

The results and reasons for decisions on complaints and appeals must be formally adopted, issued in written form, and announced publicly. A public record of election complaints and appeals should include sufficient detail about the complaint, its consideration, and resolution to provide a full understanding of the circumstances and issues involved.²¹

Any procedure specific to resolving electoral disputes must be simple, and providers with special appeal forms to help make it so.²² For example, the training sessions on application of Albania's electoral law by the courts in April of 2001 stressed the need to eliminate formalism, to avoid decisions of inadmissibility, especially in politically sensitive cases.²³

The best practice for election complaints and appeals is to provide for an expedited process of complaint and appeal, permitting resolution of complaints in an effective manner - if possible, *during* the election.²⁴

²⁰ See CDL Guidelines, I., 1.2. iv: "There should be an administrative procedure - subject to judicial control - or to a judicial procedure, allowing for the registration of a voter who is not registered" See also, CIS Electoral Convention, 16(1). See, generally, ODIHR, "Election Dispute Report."

²¹ See ODIHR Final Report on the 2002 Parliamentary Elections in the former Yugoslav Republic of Macedonia. See also ODIHR Final Reports on the 2002 Ukrainian Parliamentary Elections, 2001 Belarussian Presidential Elections and 1999 Uzbek Parliamentary Elections (public decisions required); 1999 Kazakh Parliamentary Elections (report on disposition of cases required).

²² CDL Guidelines (98) 45, p. 11.

²³ CDL Guidelines at § 3.6, p. 31.

²⁴ See CDL Guidelines, IV., 3.3; ACEEEO, 5(2.6); IPU, 4(9). The latter states: "States should ensure that violations of human rights in complaints relating to the electoral process are determined promptly within the time frame of the

Going beyond the requirements and practices described earlier, some additional best practices for handling election complaints and appeals include the following:

- 1) the opportunity to present or submit evidence in support of a
- 2) the opportunity to participate in a public hearing on a complaint if
- 3) the right to a fair hearing on a complaint;
- 4) the right to an impartial tribunal to decide the complaint;
- 5) the right to transparent proceedings on the complaint;
- 6) the right to an effective remedy;
- 7) the right to a timely remedy; and,
- 8) the right to appeal to court if redress is denied.²⁵

4. Transparency in Complaints

All aspects of an election body's consideration of complaints in appeals to the courts must be transparent.²⁶ A transparent complaints procedure should provide a review mechanism that serves as final arbiter of disputes. Complaints about the election process submitted by candidates and voters alike must be dealt with equitably in accordance with due process of law. Voters and candidates should have access to appropriate documentation they may need in order to present their case, as well as to adequate facilities for filing complaints with the judicial authority designated for this purpose by the electoral law. Any response to such complaint should be provided in a timely manner, and all rulings should be recorded and made public.

II. International Ad Hoc as creating a process specific to electoral disputes

A. Bodies to Address Remedies

Electoral law provisions must be more than just words on a page. Failure to comply with electoral laws must be open to challenge before an body with powers of appellate review. This is particularly applicable to the election results, which individual citizens may challenge on the

electoral process effectively by an independent and impartial authority, such as an electoral commission or the courts." *See also* ODIHR, Resolving Election Disputes Paper.

²⁵ Background report: OSCE Commitments and Other Principles for Democratic Elections, Warsaw 2003, p. 75.

²⁶ *See, generally*, CDL Guidelines, *Id.*; "Election Dispute Report," p. 18.

grounds of irregularities in the voting procedures. This also applies to decisions taken before the elections, especially in connection with the right to vote, voter registration and standing for election, the validity of candidacies, compliance with the rules governing the electoral campaign and access to the media or to party funding.²⁷

The appeal procedure should be clearly regulated by law, avoiding any positive or negative conflicts in jurisdiction. Neither the appellants nor the authorities should be able to choose the appellate body. If it is theoretically possible to appeal to the courts or to an electoral commission or where the powers of different courts, e.g., the ordinary courts and the constitutional court, are not clearly differentiated, the risk that successive bodies will refuse to render a decision is seriously increased. This problem has arisen in several CIS countries.²⁸

The legal framework should provide that every voter, candidate, and political party has the right to lodge a complaint with a competent election commission or court when an infringement of electoral rights has occurred, and the appropriate election commission/body or court must render a prompt decision. The law must provide for the right to appeal that decision to an appropriate court with authority to review and exercise final jurisdiction in the matter.²⁹ But what is appropriate for purposes of this right to appeal? A commission, a court, or both?

1. Judicial

Tremendous variations in legal systems around the world render assistance from local jurists essential. The number of local jurists will depend on various factors, such as the size of the country, the size of the population, the jurisdictional regimes (i.e., in instances where there are autonomous regions with separate rules and procedures), and the type of election. While the

²⁷ CDL Guidelines at § 3.6, p. 31.

²⁸ Armenia: CDL (2000) 103 rev., pp. 12, 13, 15 and 16; CDL - AD (2002) 7, para. 12 sf, Appendices; Azerbaijan: CDL - INF. (2000) 17, pp. 6-7; and Belarus.

international legal adviser represents the international community, local jurists are better equipped to navigate the local laws, even in instances where the legal adviser is fluent in the language.³⁰

a. Addresses the fundamental issues at stake in an election

The highest judicial body in any given country should insure that all election-related legislation, including framework legislation (i.e., civil and penal codes, criminal and civil procedure codes), which is generally considered as having primacy over other legislation, is not flawed with discrepancies, loopholes or gaps. The highest judicial body should also take necessary steps to insure the constitution of a coherent set of governing judicial precedents and that judges are acquainted with these precedents and the reasoning behind them.³¹

Denis Petit, a rule of law expert from the Office for Democratic Institutions and Human Rights (ODIHR), has suggested that well in advance of the elections, the highest entity within the hierarchy of the election commission and the highest body of the judiciary responsible for issuing final and legally binding decisions on election-related cases, should jointly develop instructions, guidelines, or resolutions in the various matters involved in election disputes. Where a dual complaint and appeals process applies, both institutions should clarify their respective areas of competence in those of the lower level courts and election commissions. Petit emphasized that mutual understandings may seriously undermine the uniform interpretation and application of election laws and regulations at lower levels and could threaten the certainty of the law and undermine confidence in the electoral process.³²

b. Appeals process and Standing

²⁹ Office for Democratic Institutions and Human Rights, *Guidelines for Reviewing a Legal Framework for Elections*, (Warsaw, March 2001) (“Legal Review Guidelines”) p. 31.

³⁰ “Election Dispute Report,” p. 22.

³¹ “Election Dispute Report,” p. 14.

Appeals may be heard by ordinary courts, special courts or the constitutional court.³³

The powers of appeal bodies are important, too. They should have authority to annul elections, if irregularities may have influenced the outcome, i.e., affected the distribution of seats. This is the general principle, but it should be open to adjustment, i.e., annulment should not necessarily affect the whole country or constituency - indeed, it should be possible to annul the results of just one polling station. This makes it possible to avoid the two extremes - annulling an entire election, although irregularities affect a small area only, and refusing to annul, because the area affected is too small. In zones where the results have been annulled, the elections must be repeated.³⁴

According to the Venice Commission's Code of Good Practice in Electoral Matters, disputes relating to electoral registers, which are the responsibility, for example, of the local administration operating under the supervision of or in cooperation with the electoral commission, can be dealt with by courts of first instance.

Standing in such appeals must be granted as widely as possible. It must be open to every elector in the constituency and to every candidate standing for election there to lodge an appeal. A reasonable quorum may, however, be imposed for appeals by voters on the results of elections.³⁵

2. Administrative

a. Address the non-fundamental issues at stake in an election

Appeals may be heard by an electoral commission. There is much to be said for this latter system in that commissions are highly specialized, whereas the courts tend to be less *au*

³² "Election Dispute Report," p. 14.

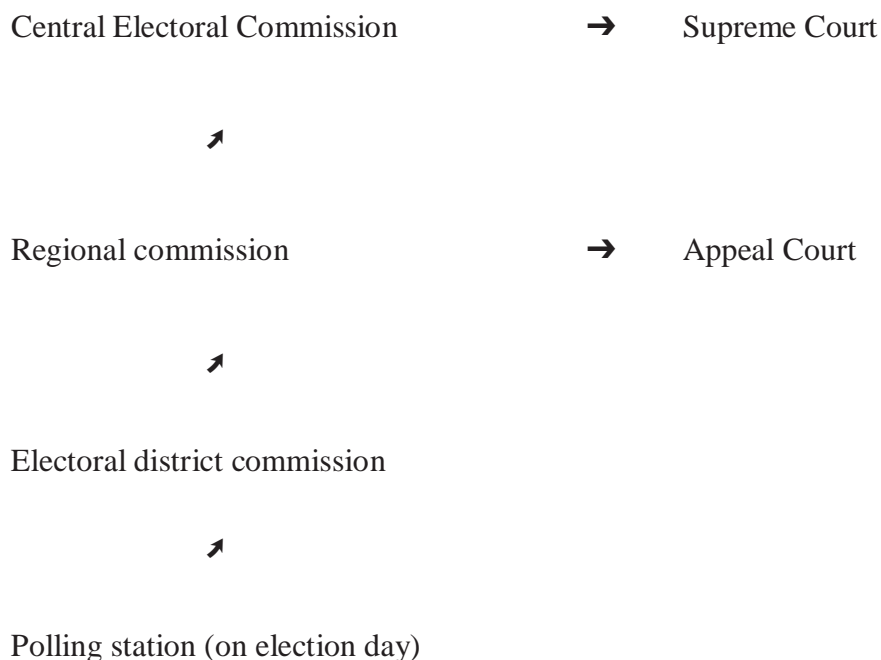
³³ *Id.*, p. 31.

³⁴ *Id.*, p. 32; Armenia: CDL (2000) 103 rev., pp. 12, 13, 15 and 16; CDL - AD (2002) 7, para. 12 sf, Appendices; Azerbaijan: CDL - INF. (2000) 17, pp. 6-7; and Belarus.

fait with electoral issues. As a precautionary measure, however, it is desirable that there should be some form of judicial supervision in place, making the higher commission the first appeal level and the competent court the second.³⁶

The CDL Guidelines recommend the following diagram:

Example:



3. Parliamentary, Legislative, or International Ad hocs

a. Potential to strengthen domestic electoral mechanisms by ensuring the legitimacy and integrity of the electoral process

i. Parliament

Appeal to parliament can result in political decisions, because parliament is being a judge of its own election.

Appeal to parliament as a judge of its own election is sometimes provided for. It is

³⁵ CDL Guidelines at § 3.6, p. 32.

acceptable as a first instance in places where it is long established, but the judicial appeal should also be possible.³⁷

ii. Legislative

Bodies with jurisdiction over election disputes should be vested with the power to enforce their decisions within a reasonable time. Electoral legislation and/or framework legislation governing the administration of justice should expressly indicate the legal consequences associated with the decisions taken by the various bodies which have jurisdiction over election disputes. It should also specify unambiguously the legal sanctions which can be imposed and enforced, including fines, imprisonment, suspension or disqualification of a candidate.³⁸

iii. International Ad hocs

Kenya

Up until December 2007, Kenya was viewed as a bastion of economic and political stability, a key U.S. ally in a volatile region. Amidst charges of a rigged General Election in Kenya and a fraudulent election of the incumbent President, beginning December 17, 2007 and lasting until the end of February 2008, Kenya was engulfed in post-election violence that erupted on a scale and at a speed that shocked both Kenyans and the world. Two months of bloodshed following the controversial Presidential election left over 1000 dead and half a million internally displaced persons.

Former UN Secretary Kofi Annan stepped in to attempt to resolve the election dispute, as a result of which a power-sharing agreement was signed on February 28, 2008. Under this unique arrangement, a new coalition government is expected to take shape once the Kenyan

³⁶ *Id.*

³⁷ CDL Guidelines at § 3.6, p. 31.

Parliament enacts the National Accord and Reconciliation Act, coupled with creation of the post of Prime Minister through a constitutional amendment and appointment of Deputy Prime Ministers from both major political parties. The agenda for reforms in Kenya's national government is ambitious and included comprehensive constitutional reform, electoral reform that will entail creation of an electoral commission and dispute resolution mechanisms, establishment of a truth, justice and reconciliation commission, identification and prosecution of the perpetrators of violence, respect for human rights, parliamentary reform, police reform, legal and judicial reform, and a commitment to a shared national agenda in Parliament for these reforms.

When Kofi Annan departed on March 2, 2008, former Nigerian foreign minister Prof. Oluyemi Adeniji assumed the role of lead mediator, announced a road map for talks to address the many issues and societal, political, ethnic and economic fissures that had been exposed by the post-election violence. The changes required to effectuate this complete overhaul of Kenya's system of governance and a 180° turn in the culture and practice of Kenya's government were broad in scope. Surprisingly, there has thus far been a consensus among politicians in Kenya and civil society on the many problems with Kenya's existing institutions and the multiple failures of successive governments to address those shortcomings, including long-standing land grievances and historic land disputes.

The agenda must go beyond the resolution of the election dispute itself, and must include accountability for those who contributed to the rigging of the December 2007 election, of incumbent politicians suspected of looting Kenya's public resources, and of those suspected of inciting or organizing political violence. Such accountability is essential for the rule of law. See generally *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, 20 Human Rights Watch, No. 1 (A), March 2008.

³⁸ "Election Dispute Report," p. 14.

B. International Election Observation Missions

Iraq

Iraq is working the pass new legislation calling for governorate elections before 1 October 2008. According to Secretary-General Ban Ki-moon's Special Representative, Staffan de Mistura, it is vital that all steps are taken to ensure that the Independent High Electoral Commission is in a state of readiness for future elections. The announcement of the heightened scrutiny was made following concerns raised by the United Nations and many political leaders in Iraq about the way in which the previous selection of 11 of Iraq's 19 governorate election office directors were conducted in September 2007, according to the UN Assistance Mission for Iraq (UNAMI). The Independent High Electoral Commission of Iraq will immediately review the qualifications, independence and performance of the 11 directors already appointed to ensure they are election ready. The selection of the remaining Directors will be one of a number of conditions necessary before holding elections. Others include clarifying the election law to be used and conducting a voter registration update.

At the request of Parliament's leadership, UNAMI has agreed to assist in the identification of qualified candidates who may apply for these jobs through the mission's website. In a very progressive move, Iraq is encouraging women and persons from all communities to apply for these important jobs. Once these directors are appointed, the Independent High Electoral Commission in Iraq should be fully operational and ready for much anticipated elections.³⁹

The Independent High Electoral Commission (IHEC) of Iraq has undertaken an effort to select 6,500 staff members to work at 550 voter registration centers across the country. The

³⁹ "Iraq: UN Announces New Process For Selecting Election Directors" *UN News Centre*, Feb 14, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=25613&Cr=Iraq&Cr1=>

board of commissioners of IHEC is currently preparing to hold the governorate council elections by the 1st of October. Further preparations for this election depend on funding and the passage of an election law by the Council of Representatives.⁴⁰

Northern Ireland

The third elections to the Northern Ireland Assembly were held on March 7, 2007 when 108 new members were selected. The election saw endorsement of the St Andrews Agreement and the two largest parties, the Democratic Unionist Party (DUP) and Sinn Féin, along with the Alliance Party, increase their support, with falls in support for the Ulster Unionist Party (UUP) and the Social Democratic and Labour Party (SDLP).

At the 2003 election the DUP and Sinn Féin became the largest parties so there was no prospect of the assembly voting for the first and deputy first ministers. Therefore the British Government did not restore power to the Assembly and the elected members never met. Instead there commenced a protracted series of negotiations. During these negotiations a legally separate assembly, known as The Assembly consisting of the members elected in 2003 was formed in May 2006 to enable the parties to negotiate and to prepare for government. Eventually, in October 2006, the Governments and the parties, including the DUP and Sinn Féin made the St Andrews Agreement and a new transitional assembly came into effect on 24 November 2006. The Government agreed to fresh elections and the transitional assembly was dissolved on 30 January 2007, after which campaigning began.⁴¹

The election was conducted using the single transferable vote applied to six-seat constituencies, each of which corresponds to a UK parliamentary seat. The DUP remained the

⁴⁰ “Top UN Envoy To Iraq Monitors Progress Of Election Preparations” UN News Centre, March 19, 2008, available at <http://www.un.org/apps/news/story.asp?NewsID=26045&Cr=iraq&Cr1=>

largest party in the Assembly, making significant gains from the UUP. Sinn Féin made gains from the SDLP and was the largest party among the Nationalists. The only other Assembly Party to make gains was the liberal Alliance Party (winning seven seats, a gain of one), while the Progressive Unionist Party and independent health campaigner Dr. Kieran Deeny retained their single seats, and were joined by the Green Party, which won its first Assembly seat, and increased its first preference votes four-fold from 2003. The UK Unionist Party lost its representation in the Assembly. They had contested 12 seats, with Robert McCartney standing in six of them.⁴²

Overall, Unionist parties were collectively down 4 seats, Nationalist parties were collectively up 2 seats, and others were up 2 seats. The election was notable as it saw the first Chinese-born person to be elected to a parliamentary institution in Europe: Anna Lo of the Alliance Party.⁴³

Palestine

On January 25, 2006, elections were held for the Palestinian Legislative Council (PLC), the legislature of the Palestinian National Authority (PNA). Notwithstanding the 2005 municipal elections and the January 9, 2005 presidential election, this was the first election to the PLC since 1996; subsequent elections had been repeatedly postponed due to the ongoing Israeli-Palestinian conflict. Palestinian voters in the Gaza Strip and the West Bank including East Jerusalem were eligible to participate in the election. Final results show that Hamas won the election, with 74 seats to the ruling-Fatah's 45, providing Hamas with the majority of seats and the ability to form a majority government on their own. According to the *New York Times*,

⁴¹ “Date Set For NI Assembly Election”, BBC News, November 26, 2006.

⁴² “Many Seats Raise Many Eyebrows”, BBC News, February 14, 2007.

⁴³ “Chinese Candidate Defies Racist Abuse” The Observer, February 11, 2007.

Hamas won 44 percent of the popular vote but 56 percent of the seats, while Fatah won 42 percent of the popular vote but only 34 percent of the seats.⁴⁴ Both parties won seats in proportion to their shares of the vote for the 66 list seats. Hamas is overrepresented in the 66 district seats because it nominated more strategically than Fatah and did not have to compete with third parties and independents for the same voters' support.⁴⁵

Unlike Fatah, Hamas has refused to recognize the right of Israel to exist. Hamas refused to participate in the 1996 elections because it viewed the Palestinian Authority as illegitimate due to its negotiations with Israel; while it has not changed that stance, it fielded candidates in 2006. Going into the election it had considerable momentum due to unexpected electoral success in the municipal elections in 2005. The prospect of a Palestinian Authority dominated by Hamas alarms Western governments, which almost universally consider it to be a terrorist group, and which provide foreign aid that makes up almost half of the Palestine National Authority's budget. The election results stunned U.S. and Israeli officials, who have repeatedly stated that they would not work with a Palestinian Authority that included Hamas, which both countries and the European Union have designated as a terrorist organization. In Washington, Secretary of State Condoleezza Rice said that a party could not "have one foot in politics and the other in terror. Our position on Hamas has therefore not changed." Javier Solana, the European Union's foreign policy chief, said in a statement that the Palestinian people had "voted democratically and peacefully." But, he added, "these results may confront us with an entirely new situation which will need to be analyzed".⁴⁶

Iran

⁴⁴ "U.S. and Israelis Are Said to Talk of Hamas Ouster", The New York Times, February 14, 2006.

⁴⁵ "It's the Election System, Stupid: The Misleading Hamas Majority and the System that Created It", FairVote, February 3, 2006.

Iran's exclusionary process of vetting candidates for the March 14 parliamentary elections violated the principles of a free and fair election, according to Human Rights Watch.⁴⁶ The widespread disqualifications of candidates, most from reformist factions, show that authorities are rejecting candidates on politically motivated grounds. The slate of candidates approved for the election shows that reformists have been permitted to stand for only a minority of the seats and therefore factions close to Supreme Leader Ayatollah Khamenei will win a majority. While there will be much competition among hardliners, reformist candidates are on the ballot in only about 106 out of the 290 districts. The Ministry of Interior conducts a first cut of applicants based on criteria set by the election laws. While some of these criteria are concrete, such as age limits and educational requirements, most are so vague that they enable authorities to make sweeping decisions without accountability.

Once the Ministry of Interior compiles a list of "qualified" candidates, the Guardian Council, composed of an unelected body of 12 religious jurists, reviews it and makes a final decision on who may stand for election. In January 2008, the Ministry of Interior announced that it had rejected more than 2,000 out of 7,597 applicants, citing such reasons for disqualifying candidates as "having ill repute in their place of residency," "insulting religious sanctities," and "acting against the state." The Guardian Council and members of the political elite then carried out a series of secret negotiations for over a month, leading to the reinstatement of some disqualified candidates and the exclusion of others. The total number of disqualifications remained roughly the same.

Most of the disqualified candidates are affiliated with reformist factions, notably those

⁴⁶ Wilson, Scott " Hamas Sweeps Palestinian Elections, Complicating Peace Efforts in Mideast" Washington Post January 27, 2006; p A01.

⁴⁷ "Iran: Reformist Candidates Barred From Election", *Human Rights Watch*, March 13, 2008, available at <http://www.hrw.org/english/docs/2008/03/13/iran18282.htm>.)

close to former president Mohammad Khatami. Individuals identifying with the principalists, the hardliner faction close to Khamenei, make up the majority of approved candidates. In February 2008, Guardian Council spokesperson Abbas-Ali Kadkhodayee claimed that complaints filed regarding disqualifications would be assessed without political prejudice and asserted that “the majority if not all” of the voting districts were competitive. As a party to the International Covenant on Civil and Political Rights (ICCPR), Iran is obligated to allow its citizens equal opportunity to compete as candidates in elections, without being subject to “unreasonable restrictions.” The ICCPR requires elections to guarantee the “free expression of the will of the electors.”

Russia

On March 3, 2008, Dmitry Medvedev, Putin’s chosen successor as president, won over 70.2% of the votes. He will now take over on May 7 as Russia's third post-Soviet leader. Mr. Medvedev, whose candidacy was supported by incumbent president Vladimir Putin and five political parties (United Russia, Fair Russia, Agrarian Party, Civilian Power, Russian Ecological Party "The Greens"), defeated candidates from the Communist Party of the Russian Federation, the Liberal Democratic Party of Russia and the Democratic Party of Russia.⁴⁸ The fairness of the election was disputed, with official monitoring groups giving conflicting reports. Some reported that the election was free and fair, while others reported that not all candidates had equal media coverage and that Kremlin opposition was treated unfairly. Monitoring groups found a number of other irregularities, but made no reports of fraud or ballot stuffing. Most agreed that the results reflected the will of the people.⁴⁹

Andreas Gross, the chairman of the 22-member delegation of European MPs, said that

⁴⁸ “Presidential Candidate Bogdanov Denies Kremlin Ties”, Reuters, January 30, 2008.

⁴⁹ “Russia Official Admits Media Bias” BBC News, March 19, 2008.

although the election result broadly reflected the will of the Russian people it fell short on a number of crucial issues, citing specifically Medvedev's "uneven access" to the media during the campaign by Kremlin-controlled state television. Gross also lamented the absence of independent candidates in the poll. The Kremlin deliberately excluded Mikhail Kasyanov, the only genuinely democratic challenger, from the race.⁵⁰

The Organization for Security and Co-Operation (OSCE) boycotted the election after the Kremlin refused to give its observers visas. Further, the Office for Democratic Institutions and Human Rights (ODIHR) on January 30 threatened not to monitor the March 2 election unless Moscow eases restrictions on the number of monitors it can send and the duration of their stay. The move came following the decision Russia's Central Election Commission to restrict the ODIHR mission to 70 observers, who were not be allowed to enter the country until three days before the election. That number pales considerably in comparison to the 387 short- and long-term observers ODIHR sent to monitor the 2004 presidential election. The row between Moscow and the OSCE's election-monitoring arm heated up ahead of Russia's parliamentary elections in December 2007, when ODIHR decided not to send observers after encountering difficulties in obtaining visas for them. Russia subsequently claimed that the U.S. State Department was behind the decision, and in December Moscow reduced its payments to the OSCE -- saying the organization was biased toward certain member states.⁵¹

Election dispute monitoring should be an integral part of election observation. It should be integrated into the election observation mission. Since the assessment of a legal system's efficiency in resolving election disputes indicates the overall state of the rule of law within a

⁵⁰ Harding, Luke, "Russia Election Not Free Or Fair, Say Observers", The Guardian, March 3, 2008, available at <http://www.guardian.co.uk/world/2008/mar/03/russia.eu>.

⁵¹ "Russia: Dispute Over OSCE Election Monitors Flares Up Again", RadioFreeEurope RadioLiberty, February 1, 2008, available at <http://www.rferl.org/featuresarticle/2008/02/e9e15831-dda8-4770-be2c-a1d36de9b634.html>

country, election dispute monitoring can help to link election observation with other human rights and democratization projects.⁵²

International election observation evaluates pre-elections, election day and post-election through comprehensive, long-term observation, employing a variety of techniques. Part of these efforts, specialized observation missions, may examine limited pre-election or post-election issues and specific processes (such as the limitation of election districts, voter registration, use of electronic technologies and functioning of electoral complaint mechanisms).

International election observation examines conditions relating to the right to vote and to be elected, including, among other things, discrimination or other obstacles that hinder participation in the electoral processes based on political or other opinion, gender, race, color, ethnicity, language, religion, national or social origin, property, birth or other status, such as physical disabilities.

The findings of international election observation missions provide a factual common point of reference for all persons interested in the elections, including the political competitors. This can be particularly valuable in the context of disputed elections, where impartial and accurate findings can help to mitigate the potential for conflict.⁵³

International election observation is conducted for the benefit of the people or the country holding the elections and for the benefit of the international community. It is process-oriented, not concerned with any particular electoral result, and is concerned with results only to the degree that they are reported honestly and accurately in a transparent and timely manner. No one should be allowed to be a member of an international election observer mission unless that

⁵² "Election Dispute Report," p. 22.

person is free from any political, economic or other conflict of interest that would interfere with conducting observations accurately and impartially and/or drawing conclusions about the character of the election process accurately and impartially. These criteria must be met effectively over extended periods by long-term observers, as well during the more limited periods of election day observation, each of which periods present specific challenges for independent and impartial analysis.

In the United Nations Code of Conduct for International Election Observers, the United Nations states that election observers must maintain a respectful attitude toward electoral officials and other national authorities when in a host country. Observers must note if laws, regulations or actions of the state and/or electoral officials unduly burden or obstruct the exercise of election-related rights guaranteed by law, constitution or applicable international instruments.⁵⁴ The Code, however, does not specifically go on to define what actions could “unduly burden” or “obstruct the exercise of election-related rights guaranteed by law” are. The Code goes on to say that international election observers also must report to the leadership of the observation mission any conflicts of interest they may have and any improper behavior they see conducted by other observers that are part of the mission.⁵⁵

International election observation missions are expected to issue timely, accurate and impartial statements to the public (including providing copies to electoral authorities and other appropriate national entities), presenting their findings, conclusions and any appropriate recommendations they determine could help improve election-related processes. Missions should announce publicly their presence in a country, including the missions mandate,

⁵³ Declaration Of Principles For International Election Observation, commemorated October 27, 2005, at the United Nations, New York, p. 3, ¶ 5.

⁵⁴ Code of Conduct for International Election Observers, commemorated October 27, 2005 at the United Nations, New York, p. 1.

composition and duration, make periodic reports as warranted and issue a preliminary post-election statement of findings and a final report upon the conclusion of the election process. International election observation missions may also conduct private meetings for those concerned with organizing genuine democratic elections in a country to discuss the mission's findings, conclusions and recommendations. International election observation missions may also report to their respective intergovernmental or international non-governmental organizations.⁵⁶

International election observers pledge to cooperate with others in conducting international election observation missions.⁵⁷

1. UN Restrictions on International Election Observation Missions

Because there are no current international election standards with timely effective appropriate enforceable remedies, the United Nations has taken a very passive role with regards to countries holding elections. The United Nations will not send an international election observation mission to a country to make sure they are following any guidelines on international election standards unless that country takes the following actions:

- (a) issues an invitation or otherwise indicates its willingness to accept

⁵⁵ Id.

⁵⁶ Declaration Of Principles For International Election Observation, commemorated October 27, 2005, at the United Nations, New York, p. 3, ¶ 7.

⁵⁷ As of October 24, 2005, these organizations include the African Union, the Asian Network for Free Elections (ANFREL), the Carter Center, the Center for Electoral Promotion and Assistance (CAPEL), the Commonwealth Secretariat, the Council of European Commission for Democracy Through Law (Venice Commission), the Council of Europe-Parliamentary Assembly, the Electoral Institute of Southern Africa (EISA), the European Commission, the European Network of Election Monitoring Organizations (ENEMO), the Electoral Reform International Services (ERIS), IFES, the International IDEA, the Interparliamentary Union, the International Republican Institute (IRI), the National Democratic Institute (NDI), the Organization of American States (OAS), the Organization for Security and Cooperation in Europe, Office of Democratic Institutions and Human Rights (OSCE/ODIHR), the Pacific Islands, Australia and New Zealand Electoral Administrators' Association (PIANZEA), the Pacific Island Forum, the Southern African Development Community Parliamentary Forum (SADC-PF), and the United Nations Secretariat, the United States Association of Former Members of Congress (USAFMC).

international election observation missions in accordance with each organization's requirements sufficiently in advance of elections to allow analysis of all the processes that are important to organizing genuine democratic elections,

(b) guarantees unimpeded access of the international election observer missions to all stages of the election process and all election technologies, including electronic technology and the certification process, electronic voting and other technologies, without requiring election observation missions to enter into the confidentiality or other non-disclosure agreements concerning technologies or election processes, and recognizes that international election observation missions may not certify technologies as acceptable,

(c) guarantees unimpeded access to all persons concerned with election processes, including;

(i) electoral officials at all levels, upon reasonable request,

(ii) members of legislative bodies and government and security officials whose functions are relevant to organizing genuine democratic elections,

(iii) all of the political parties, organizations and persons that have sought to compete in the elections (including those that qualified, those that were disqualified and those that withdrew from participating) and those that abstained from participating,

(iv) news media personnel, and

- (v) all organizations and persons that are interested in achieving genuine democratic elections in the country,
- (d) guarantees freedom of movement around the country for all members of the international election observer mission,
- (e) guarantees the international election observer mission's freedom to issue without interference public statements and reports concerning its findings and recommendations about election-related processes and developments,
- (f) guarantees that no governmental, security or electoral authority will interfere in the election of individual observers and other members of the international election observation mission or attempt to limit its numbers,
- (g) guarantees full, countrywide accreditation (that is, the issuing of any identification or document required to conduct election observation) for all persons selected to be observers or other participants by the international election observation mission as long as the mission complies with clearly defined, reasonable and non-discriminatory requirements for accreditation,
- (h) guarantees that no governmental, security or electoral authority will interfere in the activities of the international election observation mission, and
- (i) guarantees that no governmental authority will pressure, threaten action against or take any reprisal against any national or foreign citizen who works for, assists or provides information to the international election observation mission in accordance with international principles for

election observation.⁵⁸

A uniform guideline of international election standards, complete with effective, timely, appropriate and enforceable remedies would potentially strengthen domestic electoral mechanisms by taking a more affirmative role in ensuring the legitimacy and integrity of the electoral process.

III. Problems in determining timely, effective, and enforceable remedies:

An election within the OSCE region may not meet the ideal standard as set out in the commitments. An election process can also be subject to imperfections and irregularities. While isolated infractions are serious and should be noted, a pattern of recurring and systematic irregularities may indicate a serious threat to the integrity of the election process.⁵⁹

A. Access to review board or judicial body

The ODIHR in its Election Observation Handbook recognizes that there is a huge problem in the competence of or access to a review board or judicial body in any given country. This can prevent a complete examination of the entire process with regards to effective, timely, appropriate, and enforceable remedies. In the case of newly democratizing states, the OSCE commitment may not initially be fulfilled to the same extent as in long-established democracies. However, all OSCE participating states are committed to do their utmost to ensure that their principles are upheld.⁶⁰

B. Enforcement

One of the main problems of international election standards remedies is enforcement. For example, according to the Copenhagen Document:

⁵⁸ Declaration Of Principles For International Election Observation, commemorated October 27, 2005, at the United Nations, New York, pp. 4-5, ¶ 12.

⁵⁹ Bluebook

⁶⁰ ODIHR Election Observation Handbook, 4th edition (Warsaw, April 1999) (“Bluebook”).

All signatories will 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.⁶¹

The above section provides an assurance that candidates will be duly installed in office but does not specify any procedure as to how they will be installed.

C. Inherent Problems in All Appeal Proceedings

It is imperative that appeal proceedings be as brief as possible. Two pitfalls must be avoided: First, that appeal proceedings retard the electoral process and second, due to their lack of suspensive effect, decisions on appeals - other than those concerning the voting in the elections and the results - are taken after the elections have been held. Finally, decisions on the results of elections must also not take too long, especially where the political climate is tense. This means both that the time limits for appeals must be very short and that the appeal body must make its ruling as quickly as possible. Time limits must, however, be long enough to make an appeal possible and for the commission to give its ruling. A time limit of three to five days (both for lodging appeals and making rules) seems reasonable. It is, however, permissible to grant a little more time to supreme and constitutional courts for their ruling.⁶²

IV. Remedies

A. Need for timely, open, and available remedies

⁶¹ Document of the Second Conference on the Human Dimension of the CSCE (Copenhagen, 5 June - 29 July, 1990), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE ("Copenhagen Document"), § 7.9

⁶² CDL Guidelines at § 3.6, p. 31.

Guy S. Goodwin-Gill's 1994 study of free and fair elections⁶³ emphasized the pragmatic dimension of remedies for the many types of complaints that will inevitably arise when infringements of the electoral system occur. These infringements consist of denying a person the right to stand as a candidate, denying a person the right to vote, suppressing voter turnout, misinterpreting election laws or procedures, inaccurate vote counts, and even violations of criminal law. The fundamental need for a remedy to address such infringements is clear:

The right to a remedy for violation of human rights is itself a human right, while sanctions against those who infringe the provisions of the electoral law are implicitly required in any effective system of implementation. The integrity of the system requires not only that such issues be dealt with by an independent and impartial authority, such as the electoral commission or the courts, but also that decisions be reached in a timely manner, in order that the outcome of elections not be delayed. As with other aspects of the electoral process, the availability of such procedures must be open and known to the electorate and the parties.⁶⁴

B. Timeliness of Response

The timeliness of response, moreso than the sanction imposed against those who have violated electoral laws, is more important and central to the voter's "essential freedom to choose."⁶⁵ For example, prompt reaction to errors and violations of a substantial nature, in contrast to mere errors of form, is needed particularly in cases of violence or intimidation in the electoral process to prevent continuing disturbances from interfering that essential freedom. The core principle at stake is that the national interest can best be met by "speedy resolution of

⁶³ Guy S. Goodwin-Gill, *Free and Fair Elections: International Law and Practice* 80-91 (Intra-Parliamentary Union 1994).

⁶⁴ *Id.* at 80.

⁶⁵ *Id.*

potentially divisive issues."⁶⁶

C. Representative Democracy and Entitlement to Represent the State

On the international level, the availability of remedies for violation of fundamental principles surrounding the conduct of periodic free and fair elections may be more problematic, with each nation state exercising its prerogative to choose how best to uphold the integrity of representative authority. Each state must be given latitude to address and achieve the objective of holding free and fair elections within the context of its own political, cultural, and historical underpinnings.

That latitude and freedom to choose is not without limits. In the context of a system of increasingly interdependent states, the argument has been made - irrefutably many would say - that the international community has a cognizable, enforceable interest in every nation's electoral process, even to the point of making a nation's recognition of the right of its citizens to a democratic representative authority through the manner by which those citizens express their will as a condition precedent to "membership in the society of nations."⁶⁷

D. Conditioning Parameters Under International Law

Goodwin-Gill points to the secret ballot as an example of one of the conditioning parameters set by international law, beyond which a state does not have the option to choose otherwise:

The rule with respect to the secret ballot crosses from an obligation of result to one of conduct; alternatives are not allowed. Instead, the state is bound to take such steps as are necessary to ensure not only that secrecy is observed and maintained, but also that the integrity of the choice so made is protected in the

⁶⁶ Id. at 80.

⁶⁷ Id. at 91.

count that follows and in the implementation of the result.⁶⁸

In a broader vein, the choices open to a state in regulating electoral campaigns are further limited by such fundamental human rights as the right to hold and express opinions, the right to receive and share information, and fundamental freedoms of movement, association and assembly. As Goodwin-Gill emphasized in this context,

If the will of the people is to find expression in a genuine election involving policies and representatives, then human rights must be effectively respected and protected so as to allow an informed choice to be made; only the narrowest of limitations are permitted, commensurate with what is necessary in a democratic society and with the paramount consideration of ensuring that the election reflects the will of the people.⁶⁹

UN-Sponsored Electoral Dispute Resolution Workshop

Electoral disputes can arise in the context of any election. Remedies and mechanisms for the resolution of electoral disputes are essential components of any electoral process, critical to credible elections and relevant to every part of the electoral cycle. Recently, attention has been drawn to various mechanisms that can be effectively applied to the resolution of electoral disputes. Representatives of electoral commissions from countries and regions around the world convened in Vienna, Austria June 25-29, 2007 for a workshop on electoral dispute resolution mechanisms. This workshop, attended by representatives of the UN, OSCE/ODIHR, IFES and other international organizations, was facilitated by the 7th Global Forum on Reinventing Government: Building Trust in Government.

The focal point of the workshop was the exchange of ideas and experiences on many aspects

⁶⁸ Id. at 83.

⁶⁹ Id.

of electoral dispute resolution, including international standards, best practices, formal and informal mechanisms to solve electoral disputes over electoral results. Participants examined the full range of tools and methods for EDR, evaluated different mechanisms and methodologies, how they might be applied and at what entry point in the electoral process.

The findings of the workshop were remarkable. Overall, the workshop participants recognized that electoral disputes can arise in well-established or transitional democracies as well as post-conflict countries, and thus should not be viewed as a symptom of poor or manipulated electoral processes, but as a demonstration of the democratic process that seeks the expression of different views. The workshop also made these findings:

- (1) A comprehensive approach to electoral dispute resolution (EDR) must consider the entire electoral cycle.
- (2) EDR systems should be designed in a way to enable relevant bodies to exercise their duties throughout the electoral period.
- (3) EDR mechanisms must include both *political EDR systems* (those where a political assembly is ultimately responsible for judging electoral-related disputes, often through certification of election results) and *legal EDR systems* (Constitutional Courts or Councils, specialized electoral courts with specific mandates to resolve electoral disputes, Judicial EDR systems in which complaints and appeals are handled by ordinary courts of justice, Administrative EDR systems in which disputes are handled by administrative bodies with final election decision powers, and Ad Hoc provisional bodies established either domestically or by the international community to resolve a specific electoral conflict or deal with transitional elections).
- (4) Further study, discussion and evaluation must continue with respect to the introduction of

conflict prevention techniques and ADR methodologies to electoral managers, who in turn can be oriented and better prepared to help manage conflict and limit violence.

The use of strategies and methodologies such as those implemented in the recent Kenya post-electoral violence resolution is relatively new, and it should merit the attention of the international community. The EDR workshop dealt with very similar conflict prevention and alternate dispute resolution techniques. Of course, these methods often fall outside core electoral legal mechanisms and are based on political rather than legally binding methods. The workshop noted, nonetheless, that such mechanisms can include – as they did in Kenya – such measures as summoning of political party committees by electoral authorities for consultation purposes or mediation techniques – such as those implemented by Kofi Annan – to tackle serious differences among stakeholders on issues related to the electoral process.

Finally, the EDR workshop underscored the importance of civic and voter education programs, which in the future should (1) contain information about EDR mechanisms and provide details about institutions responsible to addressing electoral complaints, appeals and steps necessary to file them, (2) promote enhanced transparency of the process used by EDR bodies through publication of their deliberations and decisions, and (3) continue to advocate a central role for civil society in civic and voter education campaigns in order to ensure the increase of overall credibility of the electoral process.

Conclusion

In the final analysis, therefore, discernment and enforcement of international standards applicable to remedies for election law violations and other dispute-resolution methodologies depend upon the integrity and resolve of the international community. Most recently, the international community, consisting of foreign governments, the African Union, and the United

Nations, played a major role in applying diplomatic pressure on the Kenyan government and the opposition in order to control rampant post-election violence. Through such intervention and thus-far successful mediation initiated by Kofi Annan as head of the UN-backed African Union mediation team, measures are in place to formalize the respect for human rights of Kenyans and to reach a political settlement. The Kenyan intervention, the resulting power-sharing arrangement and the much-needed reduction of political uncertainty and instability in Kenya may be seen as a model of diplomatic action patterned after the “Responsibility to Protect” principles adopted by the UN while Kofi Annan was UN Secretary-General. The international community must be willing to take just such a proactive role in articulating the minimum acceptable requirements for due process and an independent judiciary when considering any realistic remedy for election violations. Indeed, fundamental due process and an independent judiciary are the underpinnings of any rationally enforceable and feasible remedial measure in the context of elections that are the subject of observation and external enforcement by the member states of the international community. Without these underpinnings, any electoral system and the officials charged with its administration will not be subject to effective oversight, correction, or any practical remedial measure to address such violations.

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