Tracking Expression:

Monitoring, Reporting and Addressing Human Rights Violations During Elections

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TRACKING EXPRESSION: MONITORING, REPORTING AND ADDRESSING HUMAN RIGHTS VIOLATIONS DURING ELECTIONS

Abbreviations

ACHPR	African Charter on Human and People's Rights (Banjul Charter)
ACHR	American Convention on Human Rights
ACmHPR	African Commission on Human and Peoples' Rights
AIPPA	Access to Information and Protection of Privacy Act 2003
ARHRS	African Regional Human Rights System
AU	African Unity
AU	African Union
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CESCR	Committee on Economic, Social and Cultural Rights
CMW	Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
CoE	Council of Europe
CPRW	Convention on the Political Rights of Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
DEDAW	Declaration on the Elimination of Discrimination against Women
DGICCP	Declaration on the Granting of Independence to Colonial Countries and Peoples
ECHR	European Convention on Human Rights
ECOWAS	Economic Community of West African States
ECtHR	European Court of Human Rights
EMB	Electoral Management Body
HRC	Human Rights Committee
ICCPR	UN International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IIDEA	International Institute for Democracy and Electoral Assistance
LOMA	Law and Order Maintenance Act 1960
ODIHR	Office for Democratic Institutions and Human Rights

OHCHR	Office of the High Commissioner for Human Rights
OSCE	Organisation for Security and Co-operation in Europe
PDPM	Prevention of Discrimination and Protection of Minorities
SADC	Southern African Development Community
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHRC	United Nations Human Rights Council
ZLHR	Zimbabwe Lawyers for Human Rights
ZWSC	Supreme Court of Zimbabwe

Treaties and Other Documents

United Nations Treaties

Charter of the United Nations (adopted 26th June 1945)
CIS, Convention on Democratic Elections (adopted 7th October 2002)
Convention on the Elimination of All Forms of Discrimination against Women (adopted 18th December 1979)
Convention on the Political Rights of Women (adopted 20th December 1952)
Convention on the Rights of Persons with Disabilities (adopted 13th December 2006)
Convention on the Rights of the Child (adopted 20th November 1989)
International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21st December 1965**)**
International Covenant on Civil and Political Rights (adopted 21st December 1966)
International Covenant on Economic, Social and Cultural Rights (adopted 16th December 1979)
Optional Protocol to the Convention on the Elimination of Discrimination against Women (adopted 10th December 1999)
Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16th December 1966)
Optional Protocol to the International Covenant on Civil and Political Rights (adopted 16th December 1966)
United Nations Convention Against Corruption (adopted 31st October 2003)
Vienna Convention on the Law of Treaties (adopted 23rd Mary 1969)

Other UN Instruments

Declaration on the Granting of Independence to Colonial Countries and Peoples (14th December 1960)
1999 Joint Declaration adopted by UN Special Rapporteurs on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe and the Special Rapporteur on Freedom of Expression of the Organisation of American States (26th November 1999)
Universal Declaration of Human Rights 1948
UN General Assembly Resolution A/RES/46 /137 (dated 17th December 1991)
The 1994 Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections (26th March 1994)
UN General Assembly, Declaration on the Elimination of Discrimination against Women (7th November 1967)
UN General Assembly, Status of the International Convention on the Suppression and Punishment of the Crime of Apartheid : resolution / adopted by the General Assembly., 16th December 1992
Declaration on Social Progress and Development (11th December 1969)
Declaration on Criteria for Free and Fair Elections (26th March 1994)

Regional Instruments

The Council of Europe

European Convention on Human Rights 1950
European Convention for the Protection of Human Rights and Fundamental Freedoms (signed 4th November 1950) as amended by Protocol No.1 (20th March 1952)

The Organization of American States

American Convention on Human Rights (signed 22nd November 1969)
Organization of American States, American Declaration of the Rights and Duties of Man (Published 2nd May 1948)
Inter-American Declaration of Principles of Freedom of Expression

African Union

African (Banjul) Charter On Human and Peoples' Rights (adopted 27th June 1981)
African Charter on Human and Peoples' Rights (adopted 27th June 1981)
African Commission on Human and People's Rights, Resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa (adopted 23rd October 2002)
African Union, African Charter on Democracy, Elections and Governance (adopted 30th January 2007)
African Union, African Union Convention on Preventing and Combating Corruption (adopted 11th July 2003)
Declaration of Principles on Freedom of Expression in Africa (adopted 22nd October 2002)
OAU/AU Declaration On The Principles Governing Democratic Elections In Africa - AHG/Decl. 1 (XXXVIII), 2002 (May 2004)
Protocol A/SP1/12/01 on Democracy and Good Governance Supplementary to the Protocol relating to the Mechanism For Conflict Prevention, Management, Resolution, Peacekeeping and Security (adopted 21st December 2001)

League of Arab States

Arab Charter on Human Rights (22nd May 2004)

Other

1962 Draft General Principles on Freedom and Non-discrimination in the Matter of Political Rights adopted by the Sub-Commission of Minorities; Principle VIII.
CoE, Recommendation, Rec. (2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting
Diaspora Voting Right draft bill by Sierra Leone Policy Watch
Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1962 Draft General Principles
The Code of Conduct for Law Enforcement Officials adopted by the UN General Assembly

National Laws and Constitutions

The Republic of South Africa

Human Rights Commission Act 54 of 1994
Promotion of Access to Information (PAIA) Act 2, 2000
Promotion of Equality and Prevention of Unfair Discrimination Act 4, 2000

The Republic of Zimbabwe

1979 Lancaster House Constitution
Access to Information and Protection of Privacy Act 2003 (AIPPA) (Zimbabwe)
Law and Order Maintenance Act 1960
The Constitution of Zimbabwe (As amended to 1st February 2007).

Syrian Arab Republic

Private Associations and Institutions Act No.93 of 1958

Federal Republic of Nigeria

Government of Nigeria Military Decrees 1994 Nos.6 7 and 8

The Republic of Korea

National Security Law Act (South Korea)

Canada

Bill No.178 (amendments to the Charter of the French Language) enacted by the Government of Quebec

Republic of Sierra Leone

Sierra Leone National Constitution 1991

Republic of Liberia

The Constitution of Liberia 1986

Oriental Republic of Uruguay

Institutional Act No.4 of September 1976

TRACKING EXPRESSION: MONITORING, REPORTING AND ADDRESSING HUMAN RIGHTS VIOLATIONS DURING ELECTIONS

Introduction

We have witnessed the strength and courage of people across the world aspiring for a life without arbitrary restrictions on their liberty and a constant fear of their human rights being disregarded. A first step towards fulfilling their dreams is the right to elect their representatives in free and fair genuine elections. This demand for democracy has given rise to renewed interest in the standards which are a prerequisite for fair elections. Over the years a lot of work has been done in this area by both the UN and others. A list of some useful documents which have been relied on in the production of this manual are acknowledged and referenced in Annex 1. These documents are largely aimed either at academic analysis of the framework of international and regional legal instruments or at the other end of the scale, at providing practical training and assistance to observers and monitors on details of the electoral process.

This manual is intended to be an effective toolkit for lawyers, human rights defenders, election observers and monitors and other parties interested in the process of democratic elections. This manual weaves together an understanding of international, regional and domestic law with practical considerations. It effectively links legal standards with actual practices in the various stages of the electoral process. This is an approach taken most notably by the Carter Centre, in its production of its *Database of Obligations*. It is hoped that this approach, tailored specifically to focus on Zimbabwe will assist lawyers, observers and interested parties in a number of ways. The manual clearly sets out the international and regional norms and standards relating to all aspects of the electoral process, demystifying the plethora of instruments and guidance on this issue. It aspires to assist in the identification of potential complaints, appeals and petitions in this way. It provides an understanding for observers of not merely what practices are permitted but sets in a broader context the rationale for such permissions in order that observers may view events specifically as well as holistically.

This manual deals with the specific international standards and norms, providing an explanation of the principles, followed by the application of interpretive texts from regional instruments, academic and legal commentary and examples of state practices to elaborate the principle. This manual also places emphasis on training of lawyers in areas of human rights which are prerequisite in international norms to the creation of the environment most conducive to “free and fair” elections, namely the rights to freedom of expression, information, association and assembly. Throughout the manual where relevant examples are provided of decisions or rulings which have emerged in the jurisprudence in order to demonstrate how international norms have been interpreted in actual cases.

This manual seeks to set out the fundamental freedoms which are necessary ingredients for meaningful elections. These can act as a guide for those countries who genuinely desire to hold democratic elections. They are also key markers in assessing, identifying and reporting irregularities or other issues during an election period.

PART I: HUMAN RIGHTS

A. UN HUMAN RIGHTS STANDARDS IN ELECTIONS

The basis of a democratic state is liberty[1]

Elections are a "human rights event";[2] they give a voice to the free political will of the people. For elections to be truly free and fair, they must be conducted in an environment which respects human rights and fundamental freedoms.

The right to take part in government is a universally proclaimed fundamental right, guaranteed by the Universal Declaration of Human Rights ("UDHR"), the International Covenant on Civil and Political Rights ("ICCPR") and the African, European and American regional human rights systems.

If the right of citizens to participate in the conduct of public affairs is to be meaningfully exercised, the support of other rights is required. These other rights seek to ensure freedom from fear and intimidation and include the right to freedom of expression, association and peaceful assembly. These rights must be capable of enjoyment without discrimination.

1. UN Human Rights Standards in Elections

Over the past two decades the United Nations ("UN") and the international community have responded to the growing thirst for democracy and the need for minimum standards to be respected. The UN designated the Under-Secretary-General of Department of Political Affairs as the focal point for electoral assistance, the Electoral Assistance Unit was established to assist with such requests. Together with the other UN bodies they seek to promote universal understanding and respect of the standards and rights to ensure free and fair elections.

1.1 Basic Standards

Three golden threads run through international standards on elections:

1. the right to take part in government;
2. the right to vote and to be elected; and
3. the right to equal access to public service.

The basis of government authority is the will of the people.

[1] Aristotle
[2] As described by the United Nations Centre for Human Rights ("UNCHR").

Article 21, UDHR

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

2. Everyone has the right to equal access to public service in his country.

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent voting procedures.

Article 25, ICCPR

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.

These UDHR terms were further explained in the 1962 *Draft General Principles on Freedom and Non-discrimination on the Matter of Political Rights* by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Another document which gives more precision to the international norms is the 1989 *Framework for Future Efforts at Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections* adopted by the Commission on Human Rights.

1.2 Self-Determination

Self-determination is a cornerstone of democracy and democratic elections are a vital ingredient in this fundamental concept.

This right is found in a number of key Charters and Treaties. The importance of the right is highlighted by its prime location in Articles 1 of the Charter of the United Nations, the ICCPR and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").[3]

1.3 Political Participation

Whilst the right to elections is not explicitly stated in all instruments, they are implicitly guaranteed through the political participation principles stated in other provisions. In particular these include the right to freely determine ones political status; the right for all people to participate in political life; and the right of all to actively participate in defining and achieving development aims.

The right of all people to participation in their country's political life is found in the UDHR, the ICCPR and ICESCR and other conventions. The right to active participation is also found in Article 5(c) of the *Declaration on Social Progress and Development*.

[3] Self-determination is also recognised regarding Non-Self-Governing and Trust Territories in Articles 73(b) and 76(b).

Political participation in elections is connected to many issues that have arisen in post-colonial development and legal instruments addressing these issues. For example Article 5 of the Declaration on the Granting of Independence to Colonial Countries and Peoples ("DGICCP") states that *"the freely expressed will and desire of the people shall guide the transfer of governmental power to them".* The right of people to freely determine their political status also appears in Article 2 of the DGICCP and Common Article 1 of the ICCPR and the ICESCR.

1.4 Other Basic Human Rights

The electoral process cannot be meaningful without the enjoyment of a number of human rights protected by the UDHR and the ICCPR as well as and other international human rights instruments. There are a number of rights which are of particular importance during an election period.

- ☒ These include: freedom of opinion; freedom of expression and information; freedom of assembly and association; and freedom of movement as well as generally being free from intimidation.

1.4.1 Freedom of opinion

In free elections it is essential that the right of people to express their opinion is unconditional, unrestricted, and absolute.

> **Article 19 ICCPR**
>
> *Everyone shall have the right to hold opinions without interference.*

Freedom of opinion is part of the wider need for a plurality of voices to be heard in a functioning democracy. It permits a true dialogue representing respect for human rights and ultimately affects the results of free elections.

1.4.2 Freedom of expression and information

Freedom of expression and information are intrinsically linked to freedom of opinion, as expression of opinion and of information are key to the public's ability to form informed opinions, to enable them to assert their political will through the free electoral process.

> ***Article 19(2) ICCPR***
>
> *Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, or in print, in the form of art, or through any other media of his choice.*

This right is not absolute, however it can only be restricted in accordance with the strict and exhaustive grounds set out in Article 19(3).

1.4.3 Freedom of assembly

The right to peaceful assembly is also a hallmark of a democratic country which respects its citizens' right of peaceable assembly. Respect of this right means that political candidates and their parties can organise meetings to inform voters and to campaign for their votes without intimidation or government interference.

> **Article 21 ICCPR**
>
> *The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with*

the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

The right also permits the organisation of political demonstrations which are important activities for expressing opinions and also disseminating information. The right is not absolute however interference or restriction of this right can only be in accordance with Article21 and must not extend beyond what is necessary to protect the public interest. States are also under an obligation to ensure that the measures it takes are the least restrictive. Additionally States have a responsibility to protect demonstrators.

1.4.4 Freedom of association

Freedom of association is essential for the functioning of independent political organisations and groups, in addition to the operation of a healthy civil society. Closely connected to the right to peaceful assembly, it enables people to form their own political opinions and movements without interference from the government.

Article 22 ICCPR

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

According to Article 22, these limitations must have procedural safeguards similar to those in Article 21, namely that they be prescribed by law and be necessary for protection of public interests in a democracy. Article 22 is also limited by Article 5, which means that Article 22 cannot be interpreted to destroy or limit the other ICCPR rights.

1.5 Non-Discrimination

The issue of non-discrimination is essential to the free participation of people in elections and community decisions. Articles 2 of the UDHR and ICPPR set out the discrimination prohibition applicable to all rights.

- ☒ No one is to be discriminated on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth of other status.

Similar non-discrimination provisions are found in other international, regional and national laws.

The legal framework of any country should ensure that all eligible citizens are guaranteed the right to universal and equal suffrage as well as the right to contest elections without any discrimination. Access to voting can be as important as substantive rights, because a right which cannot be exercised is a right denied.

In order to ensure equal opportunity to participate in the electoral process and be afforded access to all electoral events the principle of non-discrimination must be respected. It is crucial that an environment free from discrimination exists throughout the election period. Intimidation and

manipulation of the electorate is an inevitable consequence of an environment where discrimination is tolerated or deliberately cultivated. The principle is protected by the right to freedom from discrimination which is enshrined in every international and regional human rights instrument.

Article 2 UDHR

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 7 UHDR:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 2(1) ICCPR

Each State party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 2 African Charter

Every individual shall be entitled to the enjoyment of the rights and freedoms recognised and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

The principle is protected even in times of national emergency, so although State parties are permitted to derogate from their obligations under the Covenant during such times, any derogation must not result in discrimination solely on the ground of race, colour, sex, language, religion or social origin (Article 4(1) ICCPR).

Article 2 ICCPR and Article 2 ACHPR are not free-standing rights; these relate directly to the substantive rights protected within these instruments. These are in effect an integral part of the substantive rights and prohibit discrimination in their enjoyment. It is thus possible that a measure violates one of these instruments even though it may conform to the requirement of a substantive provision because when 'read together' with Article2 ICCPR/ACHPR it is actually found to be of a discriminatory nature.

Article 26 ICCPR

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 26 not limited to those rights provided for in the ICCPR. It does not merely duplicate the guarantee already provided for in Article 2 ICCPR but provides in itself an autonomous right and prohibits discrimination in law or in fact in any field regulated and protected by public authorities.[4] It imposes both a negative duty on the State to refrain from discriminating and a positive duty to prevent discrimination in law. It therefore requires a State party to ensure that when it adopts legislation the content should not be discriminatory, whether or not the legislation involves areas expressly protected in the ICCPR.[5] The provision for 'equality before the law' in Article 26 guarantees equality in the enforcement of the law so that judges and other legal administrators must not apply legislation in a manner that is arbitrary or discriminatory.[6]

1.5.1 Interpretation

'Discrimination' refers to any distinction, exclusion, restriction or preference that is based on any of the specified grounds or on any other status, and which has the purpose or effect of nullifying or impairing the recognition enjoyment, or exercise by all persons, on an equal footing, of all rights and freedoms;[7]

When considering the 'purpose' or 'effect' of difference in treatment, this includes direct discrimination, i.e. treating one person in comparable circumstances to another less favourably on prohibited grounds, and indirect discrimination, i.e. where a rule / practice / condition / requirement is on the face of it neutral but has a disproportionate effect on particular groups without any objective justification;[8]

'Any other status' goes beyond groups or categories of individuals within the specified grounds (e.g. race, sex etc), so any such additional groups / categories are protected against discrimination if the laws differentiating amongst them do not correspond to objective criteria;[9]

Regarding limitations imposed on these freedoms, when an expression seeks to destroy other established rights, the ICCPR states that *"[n]othing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant."*[10]

Case focus: Legal Resources Foundation/Zambia, ACHPR 211/98

The ACmHPR considered allegations of violation of Article 13, guaranteeing every citizen the right to participate freely in the government of his or her country. It examined the nature and content of the right to equality under Article 2. The complainant alleged that legislation enacted by the Zambian government, the Constitution (Amendment) Act of 1996, was discriminatory and violated Article 2 as anyone who wanted to contest the office of the president had to prove that both parents are/were

[4] *General Comment 18*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), HRC (adopted at its Thirty-seventh session, 1989).
[5] *General Comment 18*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), HRC.
[6] Nowak, M, in *CCPR Commentary*, N.P. Engel & Kehl, 1993.
[7] *General Comment 18,* U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), HRC.
[8] *General Comment 18*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), HRC.
[9] *Vos v Netherlands* (218/86), HRC, Opinion of Messrs Aguilar Urbina and Wennergren.
[10] ICCPR, Art. 5(1).

Zambians by birth or descent. It therefore prohibit a Zambian citizen having been duly nominated by a legitimate political party (former President Dr Kenneth David Kaunda) from contesting the elections allegedly further disenfranchised some 35% of the electorate of Zambia from standing as presidential candidates. The State argued that the limitation of the right was provided for in the Zambian Constitution under Article 11 which provided that the right to non-discrimination is 'subject to limitations'. It was further claimed that the results of a consultative process showed that the Zambian people were of the view that the Office of President be subject to the additional qualification that the President be 'an indigenous Zambian candidate of traceable descent'.

The ACmHPR took into account that there are Zambian citizens born in Zambia but whose parents were not born in what has become known as the Republic of Zambia following independence in 1964 and that all such residents were, upon application, granted the citizenship of Zambia at independence and had therefore enjoyed the rights that come with citizenship for over 30 years, which "*cannot be lightly taken away*".

The ACmHPR noted that Article 13 ACHPR contains the limitation, 'in accordance with the law', but emphasised the importance of examining the purpose or effect of any limitation and considered that a limitation could not be used to subvert rights already enjoyed. The ACmHPR held therefore that justification could not be derived solely from popular will, which accordingly could not be used to limit the responsibilities of State parties under the ACHPR. Anyone disenfranchised constituted a violation of the right; whether it was one person or 35% of Zambians was irrelevant. The suggestion that an indigenous Zambian is one who was born and whose parents were born in what came (later) to be known as the sovereign territory of the State of Zambia was arbitrary and its retrospectivity could not be justifiable. The individual citizen here had suffered discrimination by reason of place of origin and there was an additional violation of the right of citizens to participate in the government of their country 'directly or through freely chosen representatives'. The expression 'in accordance with the provisions of the law' in Article 13 is "*intended to regulate how the right is to be exercised rather than that the law should be used to take away the right*".

An individual is not considered to be subjected to discriminatory treatment within the scope of Article 26 ICCPR (and by analogy, Article 2 ICCPR and ACHPR where he or she experiences negative effects from a difference in treatment that does not also affect a group of people).[11]

Non-discrimination does not mean identical treatment, but any distinctions must be justified on an objective and reasonable basis.[12]

'Justification' for different treatment is to be assessed in relation to its aim and effects; there must be a legitimate aim and also a reasonable relationship of proportionality between the means employed and the aim sought to be realized.[13]

States cannot rely on administrative inconvenience or the possibility of abuse to justify difference in treatment.[14] Further, States cannot simply invoke 'security concerns' to render their discriminatory acts permissible.

Case focus : S. Aumeeruddy-Cziffra et al. v. Mauritius, Communication No. 35/1978 ; ***UN Human Rights Committee, U.N. Doc. Supp. No. 40 (A/38/40) at 254 (1983)***
Where an immigration law which applied only to alien husbands of national women and not alien wives of national men, was alleged to be discriminatory towards the alien men, the Committee considered that it violated Articles 2 (1), 3 and 26 ICCPR. The Government had invoked national security and argued in that case that alien men were more likely to than alien women to be a threat to national security.

[11] *Vos v Netherlands* (218/86), HRC, Opinion of Messrs Aguilar Urbina and Wennergren.
[12] *Broeks v Netherlands*, Communication No.172/1984, HRC.
[13] *Belgian Linguistic Case (No.2)* (1968) 1 EHRR 252, ECtHR.
[14] *Gueye v France*, Communication No.196/1985, HRC.

Where there are persons whose situations are in actual fact different to others, it will be discriminatory if States fail to treat them differently unless there is an objective and reasonable justification to treat them alike;[15]

It is not discriminatory to have differential treatment in the form of 'special measures' for the advancement of a socially or educationally disadvantaged section of society; where affirmative action is required in order to correct actual discrimination, such differential treatment is considered legitimate.[16]

Case focus: *R. D. Stalla Costa v. Uruguay*, Communication No. 198/1985; ***UN Human Rights Committee, U.N. Doc. Supp. No. 40 (A/42/40) at 170 (1987)***
In its decision, the Committee held that an act, for the purposes of appointing public service positions, which gave preference to persons who employment was terminated by the former military government, was permissible and not a violation of Article 25(c) ICCPR as it was remedial in nature.

1.5.2 Race

The International Convention on the Elimination of All Forms of Racial Discrimination ("CERD") prohibits any racial discrimination affecting the right to vote or to stand for election and expressly calls for universal and equal suffrage.

Article 5 CERD

In compliance with the fundamental obligations laid down in Article2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...]

(c) Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service.

As regards to fair and equal access to participation, the International Convention on the Suppression and Punishment of the Crime of Apartheid ("ICSPCA") prohibits legislative and other measures calculated to prevent a racial group of groups from participation in the political life of the country.

Article II ICSPCA

For the purpose of the present Convention, the term "the crime of apartheid", which shall include similar policies and practices of racial segregation and discrimination as practiced in southern Africa, shall apply to the following inhuman acts committed for the purpose of establishing and maintaining domination by one racial group of persons over any other racial group of persons and systematically oppressing them:

[...]

[15] *Thilimmenos v Greece* (2000) 31 EHRR 411, ECtHR.
[16] *General Comment 18*, U.N. Doc. HRI/GEN/1/Rev.1 at 26 (1994), HRC.

c. Any legislative measures and other measures calculated to prevent a racial group or groups from participation in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group or groups, in particular by denying to members of a racial group or groups basic human rights and freedoms, including the right to work, the right to form recognised trade unions, the right to education, the right to leave and to return to their country, the right to a nationality, the right to freedom of movement and residence, the right to freedom of opinion and expression, and the right to freedom of peaceful assembly and association.

1.5.3 Women

Three instruments prohibit discrimination against women, or their exclusion from the political process.

Article 4 Declaration on the Elimination of Discrimination against Women ("DEDAW")

All appropriate measures shall be taken to ensure to women on equal terms with men, without any discrimination:

(a) The right to vote in all elections and be eligible for election to all publicly elected bodies;

(b) The right to vote in all public referenda;

(c) The right to hold public office and to exercise all public functions.

Such rights shall be guaranteed by legislation.

***Article 7* Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW")**

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

Article 1 Convention on the Political Rights of Women ("CPRW")

Women shall be entitled to vote in all elections on equal terms with men, without any discrimination.

Article 2 CPRW

Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination.

Article 3 CPRW

Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.

In addition to non-discrimination on the basis of gender, positive action needs to be taken to ensure that elections are free and fare for all. In countries where female representation in parliament is an issue, a state can address this through the introduction of a gender quota. Depending on the country they could require political parties to submit a minimum number of women on their candidate lists. In addition or alternatively a country may provide that the representative body has a minimum number of seats reserved for women.

In countries where women are at a disadvantage in terms of political finance relating to either finance and network, this can be addressed by campaign codes of conduct which strictly prohibit the practice of vote buying and regulations governing how funds are raised and spent.

1.5.4 Minorities

According to the Sub-Commission on Prevention of Discrimination and Protection of Minorities ("PDPM"), in its 1962 Draft General Principles, 'positive' measures taken to ensure equal rights in respect of elections are not considered discriminatory if prescribed by law or regulation. What matters is that there are:

a. *reasonable requirements for the exercise of the right to vote or the right of access to elective pubic office;*
b. *reasonable qualifications for appointment to pubic office which stem from the nature of the duties of the office;*
c. *measures establishing a reasonable period which must elapse before naturalized persons may exercise their political rights, provided that they are combined with a liberal naturalization policy.*[17]

Additionally, the same measures are permitted if they are taken to ensure:

a. *the adequate representation of an element of the population of a country whose members are prevented by political, economic, religious, social, historical or cultural conditions from enjoying equality with the rest of the population in the matter of political rights;*
b. *the balanced representation of the different elements of the population of a country. All such measures are to be continued only for as long as there is need for them and only to the extent that they are necessary.*[18]

[17] Principle XI.
[18] *Ibid*.

B. INTERNATIONAL HUMAN RIGHTS LAW NORMS AND STANDARDS

2 Free Elections

There are two aspects to free elections:

1. They must be an expression of the free will of the voter.
2. In order to ensure that it is the free and full expression everyone's vote must be privileged and protected.

The most effective mechanism for ensuring this is secret ballots.

2.1 The Will of the People

At international and regional level there is an obligation to guarantee the free the will of the voter in elections.

Article 21 UDHR

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

[...]

3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 25 ICCPR

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

[...]

(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;

Common Article 1 of ICCPR and ICESCR

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 1 AU Declaration on the Principles Governing Democratic Elections in Africa

Democratic elections are the basis of the authority of any representative government.

Article 3(3) AU, African Charter on Democracy, Elections and Governance

State Parties shall implement this Charter in accordance with the following principles: 3. Promotion of a system of government that is representative.

Article 3 CoE, Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) as amended by Protocol No. 1

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 23 Organization of American States ("OAS"), American Convention of Human Rights ("ACHR")

Every citizen shall enjoy the following rights:… to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.

Article 5 DGICCP

Immediate steps shall be taken, in Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom.

What emerges clearly from any reading of the UN international instruments is the requirement that popular political participation must be "free". No one method for ensuring free popular participation is prescribed, but arguably it has become clear in its essence. According to the UN Office of the High Commissioner for Human Rights ("OHCHR"), to be free "*participation in elections must be conducted in an atmosphere characterised by the absence of intimidation and the presence of a wide range of fundamental human rights. To that end, obstacles to full participation must be removed and the citizenry must be confident that no personal harm will befall them as a result of their participation."*19

If elections are intended to be the full expression of the political will of the people, which is the very basis of legitimate governmental authority, they must be free. The only measure of how 'free' an election is, is the extent to which they facilitate the full expression.

2.2 Secret Ballot

Elections *"shall be held by secret vote or by equivalent free voting procedures".*[20] The international community believes that in order for elections to be truly free, procedures must guarantee that each person's vote be absolutely privileged.[21] Secret ballots protect the voting system from intimidation. In addition to Article25 (b) ICCPR, regional treaties also require that elections shall be held by secret ballot.

[19] OSCE/ODIHR, *Election Observation Handbook (6th Ed.)*
[20] Article 21(3) UDHR
[21] UNCHR, *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections,* 1994, paras 61-62.

Para 2(i) The Southern African Development Community ("SADC") Parliamentary Forum, in its Norms and Standards for Elections in the SADC Region

"*right of eligible individuals to vote unimpeded and the right to vote in secrecy in a ballot box should be protected and enshrined in the constitutions of the SADC countries".*

Protocol No. 1, Article 3 Council of Europe European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR")

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

Article 23 (b) OAS ACHR

Every citizen shall enjoy the following rights: […] to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.

The Electoral Institute of Southern Africa ("EISA") and the Electoral Commission Forum of SADC Countries stress the particular importance of the secrecy of the ballot:[22]

> *The secrecy of the ballot must be one of the great pillars on which free and fair, credible and legitimate elections rest. Voters, election officials, party agents, party supporters need to be assured of the secrecy of their ballot to avoid suspicion, mistrust, political violence, intimidation, as well as political retribution and victimization.*

Interpretations of this obligation impose a duty to maintain the secrecy of the ballot throughout the entire voting process as well as imposing a duty on voters themselves.[23]

> *Secrecy must apply to the entire procedure—and particularly the casting and counting of votes. Voters are entitled to it, but must also respect it themselves, and non-compliance must be punished by disqualifying any ballot whose content has been disclosed.*[24]

Practical Considerations

For the full expression of the political will of the people to be absolutely privileged, consideration must be given to the **design** of ballot boxes, voting compartments and all aspects of the voting procedure.

- As regards **voting operations** and vote counting it is essential that the system for balloting, whether paper, electronic or otherwise, ensures the secrecy of a voter's choice, which includes the lay-out of the polling station.[25] In order to implement such measures, electoral

[22] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* p.24
[23] The Carter Center, *Identifying Obligations for Democratic Elections: Narrative of Obligations, (draft)* 2009, p. 12.
[24] European Commission for Democracy Through Law ("Venice Commission"), *Codes of Good Practice in Electoral Matters, 2002,* sec. I.4.52
[25] CoE, Recommendation, *Rec (2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting*, Article 35. Also see, EISA and Electoral Commission Forum of SADC Countries, *Principles for Election Management, Monitoring, and Observation in the SADC Region*, p. 24

legislation and its regulations should offer clear guidance with respect to the secrecy of the ballot.[26]

- The SADC Parliamentary Forum has noted that *"in some SADC countries, polling stations are in private houses, shops and stores".* Noting that these practices compromise the secrecy of the ballot, the Forum suggests that, polling stations should be located in **public places** *" such as schools, tents, mobile vehicles that are neutral."*[27]

- According to the SADC Parliamentary Forum guidance, steps should be taken to ensure there are enough polling places to accommodate the number of voters and that polling stations are located in public places to ensure ease of access.[28]

- Care should be taken to accommodate voters with **special needs** to protect the right to vote secretly, which includes assistance to the disabled, elderly and illiterate.[29] Except in cases where a voter is being lawfully assisted, a voter cannot waive their right to secrecy of the ballot.[30]

- In practice **proxy voting** appears to be discouraged at most, or at least it is indicated that it should be strictly regulated so as not to compromise secrecy of the ballot.[31] Regionally, in Europe the issue of **family and group voting**, where the head of the household exerts control over the voting procedure of other members in some form, is widely addressed and guidance is given that it should be prohibited.[32]

- States should ensure that no-one shall be compelled by any legal or governmental authority to **disclose** the content of his or her vote.[33]

- It is suggested that safeguards should be in place to prevent removal of evidence of how a voter has voted from the polling station, which applies particularly in the case of e-voting.[34] Sensitive **election materials** should be stored securely throughout the voting process and is provided for specifically in the SADC countries: *"Sensitive election materials such as ballot boxes and ballot papers should be stored and delivered under strict security in order to prevent electoral fraud."*[35]

- In order to promote public confidence in the procedures and protections, the secrecy of the vote should be a part of the **education** of voters prior to polling day.

[26] UN Centre for Human Rights, *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections,* 1994, para 109.
[27] SADC Parliamentary Forum, *Norms and Standards for Elections in the SADC region,* para 9.
[28] The Electoral Institute of Southern Africa, *Principles for Election Management, Monitoring, and Observation in the SADC region*, p. 24; SADC Parliamentary Forum, *Norms and Standards for Elections in the SADC region,* para 9.
[29] EISA and Electoral Commission Forum of SADC Countries, *Principles for Election Management, Monitoring, and Observation in the SADC Region*, p. 24.
[30] European Union ("EU"), *Handbook for European Union Election Observation Missions* (1st Ed.), p. 97; (2nd Ed.) p. 79.
[31] According to International Institute for Democracy and Electoral Assistance (International IDEA), *Guidelines for reviewing the legal framework of elections,* p. 72. Also see Council of Europe, *Handbook for Observers of Elections,* 1997, para 2.5.5.
[32] Council of Europe, *Handbook for Observers of Elections,* 1997, para 3.3.5.
[33] See Principle VI of the *Draft General Principles on Freedom and Non-Discrimination in the Matter of Political Rights* .
[34] Council of Europe, *Recommendation Rec (2004)11 of the Committee of Ministers to member states on legal, operational and technical standards for e-voting*, Art. 51-52.
[35] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region*, p. 25.

2.3 Public Information and Voter Education

In order for elections to be the "free" expression, the obligation to provide secret ballots is necessary. Whether such an obligation is fulfilled depends in part upon the extent to which voters understand this and other rights.[36]

Funding and administration should be provided for objective, non-partisan voter education and information campaigns. Such civic education is especially critical for populations with little or no experience with democratic elections. The public should be well informed as to where, when and how to vote, as well as to why voting is important. They must be confident in the integrity of the process and in their right to participate in it.

While EMBs bear principal responsibility for voter education, political parties, civil society and international organizations may contribute to voter education efforts. State voter education campaigns should be conducted in an impartial manner and should be designed to provide sufficient information with registration and the voting process. In addition, voter education should be conducted in a timely manner

Literature should be widely available and should be published in the various national languages to help ensure the meaningful participation of all eligible voters. Multimedia methods should be employed to provide effective civic education to people with various levels of literacy. Voter educations campaigns should extend throughout the territory of the country, including to rural and outlying areas.

States should take measures to address discrimination by providing women[37] and persons with disabilities[38] with access to voter education which ensures that they understand their right to vote and how to exercise it.

2 Fair Elections

The requirement of fairness in the election process is an international norm beyond dispute. Any measures which may frustrate the will of the people would render elections unfair and violate the Article 21 (3) UDHR.[39]

The element of fairness has been directly expressed in international human rights instruments promulgated since the UDHR. Many of the provisions address the question of who must be permitted to participate in elections. Articles 2 and 21 (3)UDHR and the Articles 2 and 25 (b) ICCPR provide that suffrage must be non-discriminatory, equal and universal.

Universal Suffrage Universal suffrage requires that participation by the broadest reasonable pool of voters is guaranteed.[40] In addition to the international treaties the principle of universal suffrage is enshrined in regional instruments.

Article 23 ACHR

Every citizen shall enjoy the following rights: […] to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.

[36] The Carter Center, *Identifying Obligations for Democratic Elections: Narrative of Obligations, (draft)* 2009, p. 12.
[37] CEDAW Committee, General Recommendation 23, para 45
[38] UN, Convention on the Rights of Persons with Disabilities, Article 24
[39] UN Centre for Human Rights, *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections,* 1994, para 63.
[40] Ibid, para 64.

Article 4(2) African Charter on Democracy, Elections and Governance ("ACDEG")

State Parties shall recognise popular participation through universal suffrage as the inalienable right of the people.

Paragraph 7 Organisation for Security and Co-operation in Europe's ("OSCE") Copenhagen Document on the Second Conference on the Human Dimension of the CSCE

To ensure that the will of the people serves as the basis of the authority of government, the participating States will [...] guarantee universal and equal suffrage to adult citizens.

According to the 1962 *Draft General Principles on Freedom and Non-discrimination on the Matter of Political Rights* , when elections or consultations are held by direct vote, there shall be a general election roll, and every eligible national shall be included in that role.[41] This principle is elaborated by the Human Rights Committee ("HRC") which states that any limitations placed on universal suffrage should be based on objective and reasonable criteria.[42] According to the ACHR, such limitations include:[43]

* reaching a minimum age;
* residency;
* mental incapacity as determined by a court;
* criminal conviction;
* citizenship.[44]

Case focus: Liberia Supreme Court[45]

Constitutional requirements for residency in Liberia in Presidential elections

The Supreme Court dismissed the 17 count petition of the Movement for Progressive Change. The applicant, Simeon Freemon, filed against the participation of six of the sixteen political parties qualified to contest the pending presidential elections. The High Court based its ruling on technical grounds, noting that while Article52 (c) arguably forbids Liberians who had not resided in the country for ten years from running for president, the framers of the constitution did not anticipate the intervening security situations, which lead to the suspension of the constitution itself. The Court adjudged that "for the purpose of eligibility, we hold that Article52 (c) of the 1986 constitution of Liberia requires that a Liberian citizen shall have been resident in the Republic of Liberia at least ten years immediately preceding the presidential election in which the candidate is competing". Further, the constitutional court held that the ten years residency clause could not bar the president and the standard bearers of the opposition political parties because there were situations of was that forced them out of the country.

In regards to what constitutes unreasonable restrictions, the ICCPR itself prohibits discriminatory limitations based on race, sex, religion, political or other opinion, national or social origin, language, birth or other status.[46] Restrictions based on physical disability are also not permitted.[47]

[41] Principle V (c), adopted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities.
[42] HRC, General Comment 25, para 10
[43] ACHR, Article 23.
[44] ICCPR, Article 25.
[45] "*Liberia: Supreme Court Decides on "Residency Clause"*", 24 September 2011, African Elections Project, http://www.africanelections.org/liberia/news/page.php?news=5893.
[46] ICCPR, Articles 2 and 25.

In addition to those listed above, the HRC work is instructive as to the reasonable restrictions.

- **Limitations** on voting rights are not permissible if based upon literacy, education, property ownership, party membership, naturalised citizenship and economic circumstances.[48]
- Excessive limitations on the voting rights of convicted criminals are not permissible.[49] Restrictions must be proportionate to the offence and the sentence.[50]
- Limitations for persons convicted of electoral offences are permitted but must be limited in time.[51]

The guarantee of universal and equal suffrage to each adult citizen is an international standard that must be provided. The right to be elected as a member of the legislature or other provincial or local body, as well as the right to be elected president, may require an age beyond the age of majority, but must be guaranteed to all citizens of that age without discrimination. [52]

Venezuelan Supreme Court[53]
Supreme Court disregards rights in election case
The case involves Leopoldo Lopez, a former Carcas district mayor and a potential presidential candidate who has been barred from seeking elected office by the country's comptroller general since 2008 due to corruption allegations. However, he has never been formally charged, prosecuted, or convicted.

On September 1, based on a challenge by Lopez, the Inter-American Court ruled that Venezuela must allow him to run office. But the Supreme Court ruled that the Inter-American Court's decision was "not executable". The Venezuelan Supreme Court's decision on October 17, 2011, to disregard a binding decision by the Inter-American Court of Human Rights in the case of an opposition politician was held by Human Rights Watch to be a blow to the rule of law.

The Supreme Court said that international norms must not contradict Venezuela's constitution nor violate the country's sovereignty, and that carrying out the ruling would run counter to the government's international obligations to fight corruption. Further, in voluntarily undertaking binding legal obligations in becoming party to the Inter-American Convention on Human Rights Venezuela – and the Chavez government- is obliged not only to implement the provisions of the Convention in good faith, but is prohibited from invoking any provision of domestic law as a reason to refuse or fail to meet its obligations. It was held by the Supreme Court President, Luisa Estella Morales, that Lopez could still run for office but there was no guarantee that he would be able to take office if elected.

2.4 Voter registration

Voter registration is not always a component of an electoral process, however where it is conducted in order to determine eligibility to vote, the principle of universal suffrage applies. It requires that broad participation be promoted by ensuring that the participation of eligible voters is not inhibited in the registration process and that unnecessary technical barriers to participation, by otherwise qualified eligible voters, are removed.[54] Such conditions are specifically referred to by the EISA.

> *The voter registration process should promote broad participation and should not inhibit the participation of eligible voters… Cost effective voter identification protocols should be*

[47] UN, *Convention on the Rights of Persons with Disabilities,* Article 29.
[48] UNHRC, *General Comment 25*, para 10. Where it is based on receipt of public assistance, ownership of property or income CCPR/C/SR.161 and corrigendum; CCPR/C/SR.251 (1980) and corrigendum.
[49] CCPR/C/SR.711 (1987) and corrigendum.
[50] UNHRC, General Comment 25, para 14.
[51] CCPR/C/SR.724 (1987) and corrigendum.
[52] South African Human Rights Commission: http://www.sahrc.org.za/
[53] : Human Rights Watch, 18 October 2011, http://www.hrw.org/news/2011/10/18/venezuela-supreme-court-disregards-rights-election-case
[54] UNHRC, *General Comment 25*, para 11.

established to enable the maximum possible inclusion of eligible voters, while minimizing multiple or illegal voter registration.[55]

Universal suffrage in this context has been interpreted as meaning that any limitations placed on voter registration must be based on objective and reasonable criteria and that any limitations should be established in advance of the registration period.[56]

Practical Considerations

Universal suffrage is partially dependent on a proper voter registration process, the EISA elaborates that potential voters should be offered **continuous and accessible voter registration** facilities and sufficient time to register.[57]

This recommendation is echoed in the SADC Parliamentary Forum's guidance.[58] The facilitation of absentee registration is also a pertinent consideration.[59]

2.5 Voting

In the context of vote casting (in addition to those limitations to the principle of universal suffrage above) it may be reasonable to require the production of identification.[60]

A common practice in Latin American countries is the restriction on voting by military personnel which may be permissible within the margin of appreciation afforded to States, provided it is imposed on a rational basis, proportionate and not designed to disenfranchise parts of the population.[61]

In order to ensure broad participation States are obligated to ensure that accommodation be made for persons with disabilities so that they can vote. Polling sites must also be accessible to persons with **disabilities**.[62] The EISA places a great deal of emphasis on the facilitation of vote casting for those who are disadvantaged by virtue of being disabled, elderly or illiterate.

There are a number of categories of voters that require special consideration and accommodation in the process of vote casting. These include:

* those unable to reach a polling station;[63]
* the elderly;[64]
* the illiterate;[65]
* students;[66]
* poll workers;[67]

[55] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* p.15.
[56] UNHRC, *General Comment 25*, para 4; Goodwin-Gill, G, *Free and Fair Elections,* IPU, 2006, p. 127.
[57] NDI Handbook, *How Domestic Organisations Monitor Elections: an A to Z Guide*, p. 53; EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* p.15-16.
[58] SADC Parliamentary Forum, *Norms and Standards for Elections in the SADC region,* paras C.1.ii and 3.1: "There should be provisions and practical arrangements for continuous voter registration and an updated voters' register must be made available to all stakeholders in the elections."
[59] Venice Commission, *Code of Good Practice,* sec. I.1.1.c.
[60] EU, *Handbook for European Union Election Observation Missions,* p. 96.
[61] Goodwin-Gill, G, *Free and Fair Elections,* IPU, 2006, p. 128.
[62] UN *Convention on the Rights of Persons with Disabilities,* Article 29.
[63] International Institute for Democracy and Electoral Assistance (International IDEA), *Guidelines for reviewing the legal framework of elections,* p. 73.
[64] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* p. 24.
[65] Ibid.
[66] UNCHR, *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections,* 1994, para 110.
[67] Ibid.

* conscripts;[68]
* foreign-service personnel;[69]
* eligible voters in hospitals;[70]
* eligible voters currently out of the country;[71]
* prisoners who have voting rights.[72]

Practical Considerations

EISA emphasises that election materials must be made accessible to them; that polling venues be situated in places accessible to them; and that clear procedures are laid down for the provision of assistance for those in these groups.73

Peru[74]

Voting rights victory for people with disabilities

More than 23,000 people with mental and intellectual disabilities were excluded from the voter registry for the 2011 presidential elections based on previous government policy.

The National Registry of Identification and Civil Status issued a Resolution on 10 October 2011, to nullify policies excluding people with certain mental and intellectual disabilities from the electoral rolls. The Registry also pledged to work with relevant government agencies to ensure prompt resolution. On 14 October, the Registry presented a new national identity card to Maria Alejandra Villanueva with the voting group assignment required to permit her to vote. She had recently complained to the UN about being barred from voting in Peru because she had Down syndrome.

However, Peru's Civil Code still limits the rights of people with disabilities to exercise their voting rights, declaring that some people, including those with multiple sensory disabilities, are "absolutely incapable" of exercising civil rights, and that their legal representatives must exercise these rights in their stead. These provisions contravene the Convention on the Rights of Persons with Disabilities, ratified by Peru in January 2008, which states that "persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life," which includes voting and political participation.

Furthermore, facilitation of voting by persons in any of the categories above may be achieved through a number of methods, which include:

* early voting;[75]
* postal voting;[76]
* electronic voting[77]
* mobile voting;[78]
* out-of-country-voting;[79]
* establishing polling sites in hospitals;[80]

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[68] Ibid.
[69] Ibid.
[70] International Institute for Democracy and Electoral Assistance (International IDEA), *Guidelines for reviewing the legal framework of elections,* p. 73.
[71] Goodwin-Gill, G, *Free and Fair Elections,* IPU, 2006, p. 126.
[72] International Institute for Democracy and Electoral Assistance (International IDEA), *Guidelines for reviewing the legal framework of elections,* p. 73.
[73] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* pp. 23-24.
[74] Reuters, 7 October 2011, http://www.trust.org/alertnet/news/peru-voting-rights-victory-for-people-with-disabilities
[75] OSCE/ODIHR, *Election Observation Handbook (6th Ed.)*, p. 75.
[76] EU, *Handbook for European Union Election Observation Missions* (2nd Ed.) p. 80.
[77] International Institute for Democracy and Electoral Assistance (International IDEA), *Guidelines for reviewing the legal framework of elections,* p. 72.
[78] EU, *Handbook for European Union Election Observation Missions* (1st Ed.), p. 97; (2nd Ed.) p. 80-, Also advocated by EISA.
[79] Ibid.

* establishing polling sites in prisons;[81]
* making special provision for members of the military to vote.[82]

2.6 Equal suffrage

2.6.1 One person one vote

Fairness in the context of elections encompasses both the principle of universal suffrage and equal suffrage. This principle has been interpreted as requiring that the rule of *"one person, one vote"* be respected, and that every vote is of equal weight.[83] The principle of equal suffrage is expressed not only in the international instruments listed above but also in a number of regional instruments.[84]

Stages of the electoral process most influenced by principle of equal suffrage are, *inter alia*:

* constituency delimitation;
* voter registration;
* polling procedures; and
* vote counting.

Measures designed to dilute or discount the votes of particular individuals, groups or geographic areas infringe the principle of equal suffrage.

The 1962 Draft General Principles expressly provide that each vote shall have the same weight and that electoral districts shall be established on an equitable basis, to ensure that the results accurately and completely reflect the will of all the voters.[85]

2.6.2 Boundary Delimitation

According to the HRC respect for equal suffrage is best achieved by assigning the same number of voters to each representative.[86] It may also be achieved through boundary assignment based on specific apportionment criteria.[87] This can be based upon the number of residents, number of resident nationals (including minors), number of registered voters, number of actual voters, or a combination thereof.[88] According to the EISA, equal boundary assignment may also account for geographical criteria or administrative or historical boundary lines provided that the delimitation is not manipulated to favour particular groups.[89]

It is important that any exercise involving boundary assignment be conducted according to a method established by law that regulates the frequency of and criteria for such a process, the degree of public participation in it, as well as the role of its stakeholders and the authority structure for conducting the exercise.[90] Given that inhabitation of districts is subject to change due to any number of factors, it is important that existing delimitation of boundaries is reviewed frequently to ensure

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[80] Norwegian Helsinki Committee, *Human Rights Monitoring*, p. 13.
[81] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region*, p. 23.
[82] EU, *Handbook for European Union Election Observation Missions* (1st Ed.), p. 97; (2nd Ed.) p. 80.
[83] HRC, General Comment 25, para.21.
[84] ACHR, Art. 23; CIS, Convention on Human Rights, Art. 29; CIS, Convention on Democratic Elections, Art. 3; OSCE, Copenhagen, para 7.3.
[85] PDPM, *1962 Draft General Principles*, V (a) and (b).
[86] UNHRC, *General Comment 25*, para 21.
[87] The Carter Center, *Identifying Obligations for Democratic Elections: Narrative of Obligations, (draft)* 2009, p. 10.
[88] Venice Commission, *Codes of Good Practice in Electoral Matters*, 2002, sec. I.2.2.13.
[89] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* pp. 13 and 24.
[90] International Institute for Democracy and Electoral Assistance (International IDEA), *Guidelines for reviewing the legal framework of elections,* p. 27.

equal voting rights.[91] According to the European Commission variances should rarely exceed 10 percent in attempting to achieve as close as realistically and practicably possible to true equality.[92]

2.6.3 Voting

Polling procedures designed to diminish the value of the votes of particular individuals, groups or geographic areas are unacceptable.[93] Practices employed to allow more than one vote per person such as ballot box 'stuffing', are clearly also prohibited as an infringement of equal suffrage.

Practical Considerations

Methods used to protect against such practices include:

* marking voter's fingers with indelible ink to prevent duplicate voting;
* showing ballot boxes to be empty at the commencement of voting; the use of transparent as opposed to opaque ballot boxes to show they are empty at the beginning; and
* sealing ballot boxes properly at the beginning of the vote.94
* All ballots, including unused ballots, should be accounted for during election day. 95 Furthermore, safeguards should be in place to ensure the accuracy of the vote, no matter the form of balloting or counting used (manual, mechanical or electronic).[96]

☒ Equal suffrage, and the "one person, one vote rule," require that no opportunity should exist to falsify or to substitute ballot papers.[97] Indeed the EISA echoes the guidance that, *"appropriate methods should be put in place to prevent multiple voting."*[98]

2.7 Election Administration

Administering elections requires that the election management bodies ("EMBS") are, and are seen to be impartial and independent of government or any other influence.[99] This is important for ensuring a fair outcome of the elections, and is also essential for building the confidence of the electorate and political parties in the electoral process. The legal framework for elections therefore must require that EMBs are established and operate in a manner that ensures the independent and impartial administration of elections.

2.7.1 Establishment of EMBs

The legal framework for elections should ensure that an objective, unbiased, independent and effective administration structure and mandate is in place. Electoral administration systems should be protected from bias or corruption by legal measures.

An EMB, unless a lower level EMB established for a certain period, should therefore be a body that functions continuously and not only for a limited time period just before elections. The EMB should be required by law to work either continuously or periodically to improve and update, prepare for an election and strengthen the system. The legal framework should require that all levels of electoral bodies be established in a timely manner before an election and be adequately funded. It is crucial

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[91] Venice Commission, *Codes of Good Practice in Electoral Matters*, 2002, sec. I.2.2.v.
[92] Venice Commission, *Codes of Good Practice in Electoral Matters*, 2002, sec. I.2.2.15.
[93] UNCHR, *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections,* 1994, para 68.
[94] EU, *Handbook for European Union Election Observation Missions* (1st Ed.), p. 97, (2nd Ed.), p. 76; SADC, *Principles and Guidelines Governing Democratic Elections*, para 10;
EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* p. 25.
[95] OSCE/ODIHR, *Election Observation Handbook* (6th Ed.), p. 80.
[96] International Institute for Democracy and Electoral Assistance ("International IDEA"), *Guidelines for reviewing the legal framework of elections,* p. 78.
[97] The Carter Centre, *Identifying Obligations for Democratic Elections: Narrative of Obligations*, (draft) 2009, p. 11.
[98] EISA, *Principles for Election Management, Monitoring, and Observation in the SADC region,* p. 25.
[99] UNHRC, General Comment 25, para 20

that the legal provisions as detail how funding for the ongoing operations of the EMB will be made available and to ensure freedom from interference from any other electoral stakeholders.[100]

The legal framework should clearly define the duties and functions of the EMB, particularly regarding:

* the election officials and staff responsible for the administration of the election are adequately trained, acting impartially and independently of any political interest;
* clear voting procedures are established and made known to the voting public;
* voters are informed and educated of the election processes, contesting political parties and candidates;
* the registration of voters and updating voter registers;
* the secrecy of the vote;
* the integrity of the ballot through appropriate measures to prevent unlawful and fraudulent voting;
* the integrity of the process for the transparent counting, tabulating and aggregating of votes.

To ensure an effective administration structure, there should be a central EMB with exclusive authority and responsibility over subordinate electoral bodies. Any intermediate electoral bodies will depend on the electoral system, geographic and demographic factors. It is essential that the relationship between the central EMB and the subordinate bodies as well as between all the election bodies and executive government authorities are defined by the legal framework. Furthermore the authority and responsibility of each EMB must also be clearly defined and should address issues including:

* how each EMB is constituted and conducts its business,
* the quorum requirements for each EMB,
* the voting rules for EMB decisions,
* how EMB's decisions are to be made public and the transparent procedures for the conduct of business.

It is critical that the legal framework contain clear and precise provisions for the composition, the impartial appointment and removal, remuneration, duties, powers, qualifications and reporting structure of electoral staff. For example, the legal framework should include the grounds and process for removal of a member to protect members from arbitrary removal and to provide immunity in connection with the performance of legal duties and salary provisions that cannot be manipulated by the government. Such provisions must ensure transparency, efficiency and equity in the recruitment of officials.[101] The law should also specify the rights of each member of the EMB, including the right to receive timely and adequate notice of meetings, the right of access to all EMB documents, and the right to participate in all EMB meetings. Staff must be insulated from bias and political pressure. A single line of ultimate authority is necessary for this purpose. These concerns are met in different ways in different countries. Examples include the adoption of a Chief Electoral Officer, or the appointment of an Electoral Commission with fair partisan representation or recognised neutrality or even both.

2.7.2 Operation of EMBs

The primary objective of a legal framework is to guide the EMB and enable it to deliver free and fair elections. It is crucial therefore for EMBs to operate independently, transparently and impartially. The essential attributes of a free and fair election and of the EMB are:

[100] OS: SADC, Principles and Guidelines, art. 7.6
[101] UN, UNCAC, Article 7

* **Independence and impartiality**: where the EMB functions without political favouritism or bias and free of interference.
* **Efficiency and effectiveness** so as to avoid technical problems which could lead to chaos and a breakdown of law and order. Efficiency and effectiveness depend upon several factors, including staff professionalism, resources and, most importantly, sufficient time to organize the election and train those responsible for its execution.
* **Professionalism**: elections should be managed by a specialized group of highly trained and committed experts who manage and facilitate the electoral process.
* **Impartial and speedy adjudication**: the legal framework should make provision for a mechanism to process adjudicate and dispose of electoral complaints in a timely manner.
* **Transparency**: In order to ensure everyone is able to access information about the election, the election management process, including meetings of election bodies, should be transparent.[102] The overall credibility of an electoral process is substantially dependent on all relevant groups (including political parties, government, civil society and the media) being aware of and participating in the debate surrounding the formation of the electoral structure and processes. Thus, constant consultation, communication and cooperation among EMBs, the political parties and the institutions of society is essential.

2.8 Legal and Technical Assurances

Ensuring the fairness of elections requires a number of legal and technical safeguards to prevent bias, fraud or manipulation. These measures are wide ranging and include provision for objective administration structures:

* for outlawing and punishing corrupt practices,
* for the presence of observers and
* for fair media access by all parties and candidates.

The legal framework of a country should require that **Electoral Management Bodies** ("EMBs") be established and operate in a manner that ensures the independent and impartial administration of elections.

In some established democracies, national and local government officials, whose neutrality and fairness are generally accepted by the electorate, handle electoral administration.

Ordinary courts settle disputes, as they have a tradition of fairness and neutrality and generally enjoy the confidence of the electorate.

Administering democratic elections requires that EMBs be, and be seen to be, impartial and independent of government or other influence. This is a critical area, as the election administration machinery makes and implements important decisions that can influence the outcome of the elections.

However, as expressed by the International Institute for Democracy and Electoral Assistance ("IIDEA"), the creation of unnecessary or superfluous electoral bodies should be avoided.

South Africa – South African Human Rights Commission[103]
Universal suffrage, constitutional change to ensure human rights protection
During the negotiations that led to South Africa's first elections on the basis of universal suffrage in April 1994 and the transition from a minority regime to a democratically elected government, much emphasis was placed on the need for new constitutional arrangements to ensure that the appalling human rights abuses of South Africa's past could not be repeated (Human Rights Watch 2001). The South African

[102] CIS, Convention on the Standards of Democratic Elections, Articles 7, 13
[103] South African Human Rights Commission: http://www.sahrc.org.za/

Human Rights Commission ("SAHRC") was established by Chapter 9 of the 1996 Constitution as an independent and impartial institution to promote respect for human rights and a culture of human rights.

The SAHRC derives additional legal mandate from the Human Rights Commission Act 54 of 1994; the Promotion of Access to Information ("PAIA") Act 2 of 2000; and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

The Promotion of Equality and Prevention of Unfair Discrimination Act, which relates to special measures to promote equality with regard to race, gender and disability has yet to come into operation since the regulations have not been promulgated (Parliament of the Republic of South Africa 2007).

2.9 Legal Authority and Structure

When referring to the legal framework for elections, its structure and authority should be unambiguous, understandable and transparent, and should address all components of an electoral system necessary to ensure democratic elections. The "legal framework", includes; the applicable constitutional provisions, the electoral law as passed by the legislature and all other laws that impact on the elections. It also includes any and all regulations accompanying the electoral and other relevant laws. It encompasses relevant directives and instructions related to the electoral law and regulations issued by the responsible EMB, as well as related codes of conduct, which may have a direct or indirect impact on the electoral process.

Fundamental suffrage rights should be safeguarded in the Constitution or other high organic law of the State. The legal authority for the rights of free expression, opinion, information, assembly and association should also rest in the highest law of the land. Statutory language should be clear, concise and adequately specific, in order to forestall potential abuse of discretion, discriminatory application, or impingement upon the rights of free expression or full participation. Such language should also be gender-neutral, to encourage participation by women, and should be translated into the languages of all voting groups.

As constitutions are generally more complicated and time-consuming to amend, constitutional provisions should not go beyond describing the very basics of electoral rights and the electoral system. In order to allow for necessary flexibility, provisions related to the management of elections should be incorporated into parliamentary legislation, and administrative and procedural matters should be left to administrative clear and detailed rules and regulations, to be issued by subsidiary bodies, including through instructions and directives of the EMBs.

Election Legislation neither can nor should contain all provisions relevant to the election process as the election process will require the involvement of institutions and procedures based on other parts of the national legal system. Hence, it is important that the existence of other relevant legislation is included in the review process. Of particular importance is national legislation governing the media, registration of political parties, citizenship, national registers, identity documents, campaign finance and criminal provisions related to election law violations. All legal provisions that have an impact on the election process should be identified and reviewed to ensure that they conform and contribute to the overall objective of holding free and fair elections.

The legal framework must ensure that the instructions and directives of EMBs at all levels are consistent with the provisions of the constitution and the electoral law. The legal framework must ensure that the provisions relating to national level elections, sub-national (provincial or state) level and local elections are in harmony with each other. This is so as to ensure the overall objective of holding free and fair elections is met and implemented consistently. Certain principles fundamental to election legislation must be borne in mind:

* That election legislation is stated in unambiguous language and avoids conflicting provisions between laws governing national elections and laws governing sub-national and local elections.
* Provisions governing the administration of national elections should be in harmony with the provisions governing such other elections because court decisions at one level could affect legislation in other jurisdictions.
* The respective powers and responsibilities of the national and local electoral management bodies, and governmental bodies, should be clearly stated, distinguished and defined to prevent conflicting or overlapping powers being exercised by other bodies.
* Election legislation should be enacted sufficiently far in advance of an election date to provide political participants and voters with adequate election date to provide political participants and voters with adequate time to become familiar with the rules of the election processes.
* Election legislation should be enacted in accordance with the applicable legal provisions governing the promulgation of laws by the legislature. Election legislation that is not enacted in accordance with the applicable legal provisions may be challenged and risks annulment by the courts.
* Election legislation should be published and made readily available for the intended users including the general public.

2.10 Offences, Penalties and Maintenance of Order

Merely incorporating provisions for a free electoral campaign in the legal framework is toothless unless it is backed by a reasonable, effective and credible sanctions regime. The legal framework must protect the political process from corruption, official misfeasance, obstruction, undue influence, bribery, treating, intimidation and all other forms of illegal and corrupt practice.

Thus criminal or civil penalties may apply. Other specific electoral penalties, such as the disqualification of candidates or parties, may also be possible. Whatever legal or other sanctions are established, a party and its members have to clearly understand their obligations. Therefore, it is important that rights, obligations and the sanctions should be spelt out unambiguously. The legal framework should ensure that penalties are not disproportionate to offences and that the same infractions are treated equally. Legal provisions for prosecutions, procedures and penalties must respect international standards for human rights in the administration of justice.

Decisions regarding the maintenance of peace and order at polling places should be made by balancing concern for security against the potential intimidating effect of a police, security or military presence. Polling officers should be delegated the authority to maintain order at polling places. Civil and criminal liability should be imposed for acts of misfeasance, nonfeasance and malfeasance by election officials.

3 Periodicity and the electoral time frame

3.1 Periodicity

The requirement to hold periodic elections is expressly provided for in Article 21(3) UDHR and Article 25 (b) ICCPR. Democracy is a continuous process which needs to be sustained. Only one election, for instance at the time of a country gaining its independence or at the end of transition, are not permissible.

The DPGDEA echoes the requirement for periodicity:

> *Regular elections constitute a key element of the democratization process and therefore, are essential ingredients for good governance, the rule of law, the maintenance and promotion of peace, security, stability and development.*[104]

Elections must be held often enough to ensure that governmental authority continues to reflect the will of the people, so as to legitimise government. No specific schedule of periodicity is prescribed by international instruments, however general limitations on discretion are observed in practice.

The OSCE Guidelines to Assist National Minority Participation in the Electoral Process provide that: *"Elections must not only be regular, but they must also be held at reasonable intervals. In most constitutions, elections are held from between 2 to 5 years."*[105]

> ***Article 3 (4) ACDEG***
> *State Parties shall implement this Charter in accordance with the following principles:*
>
> *[...] 4. holding of regular, transparent, free and fair elections.*

3.2 Postponing elections

In the absence of all but the most exceptional circumstances, disruption to the periodicity will be a violation of international standards.[106] Postponement of scheduled elections as a result of public emergency is permitted in only certain limited circumstances, and to the extent strictly required by the exigencies of the situation.

According to Article 4 ICCPR, if such extraordinary measures are taken, they must comply with international standards governing derogations and must not be a threat to democracy.[107] The UDHR itself circumscribes the extent of such limitations on the rights and freedoms therein, by providing that they must be for the purpose of *"meeting the just requirements of morality, public order and the general welfare in a democratic society"*.[108]

Security measures taken by Governments have been the subject of several rulings of the HRC concerning compatibility with the ICCPR and in particular Article 25. This provision proscribes "unreasonable restrictions" on the enjoyment of political rights.

A number of regional and international provisions highlight the exceptional circumstances when states can derogate from their obligation on countries to hold elections at periodic intervals. This includes the UN which states that,

> *A State party may take measures derogating from its obligations under the ICCPR pursuant to Article 4 (hereinafter called "derogation measures") only when faced with a situation of exceptional and actual or imminent danger which threatens the life of the nation. A threat to the life of the nation is one that: (a) affects the whole of the population and either the whole or part of the territory of the State, and (b) threatens the physical integrity of the population, the political independence or the territorial integrity of the State or the existence or basic*

[104] Article 2.
[105] OSCE, Guidelines to Assist National Minority Participation in the Electoral Process, p. 17. See http://www.cartercenter.org/des-search/des/Default.aspx.
[106] UNCHR, *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections,* 1994, para 73.
[107] Article 4 ICCPR, http://www2.ohchr.org/english/law/ccpr.htm; see annex below.
[108] Article 29, para 2.

> *functioning of institutions indispensable to ensure and project the rights recognised in the Covenant.*[109]

The OSCE holds that:

> *The participating States confirm that any derogations from obligations relating to human rights and fundamental freedoms during a State of public emergency must remain strictly within the limits provided for by international law, in particular the relevant international instruments by which they are bound, especially with respect to rights from which there can be no derogation. they also reaffirm that: (25.1) measures derogating from such obligations must be taken in strict conformity with the procedural requirements laid down in those instruments; (25.2) the imposition of a State of public emergency must be proclaimed officially, publicly, and in accordance with the provisions laid down by law; (25.3) measures derogating from obligations will be limited to the extent strictly required by the exigencies of the situation.*[110]

Election focus: Sri Lankan elections 2011[111]

Extension of elections using Emergency Regulations

For instance, during the local government elections held in Sri Lanka on 17 March and 23 July 2011 the terms of 23 local authorities that were due to have elections in 2011 were extended to 31 December 2011 using Emergency Regulations. Elections for these 23 local authorities were held on 8 October 2011.[112] Furthermore, elections to two other local authorities are due but have been repeatedly postponed due to alleged delays in resettling internally displaced persons due to the demining of the area.[113] Despite these facts the Election Commissioner judged the elections to be peaceful, free and fair. Independent election monitors have criticised the Election Commissioner and the Police for not preventing the violence and violations of electoral law.

Case focus: Palestinian elections 2011[114]

Court ruling overturned to further delay elections

The last Palestinian elections were held in January 2006. Just weeks after announcing that, in spite of the stalled reconciliation process between Hamas and Fatah, elections would be held in the West Bank, Abbas declared a reversal of that decision in a recent presidential decree. Postponing elections for the fourth time and without setting a new date, Palestinian President Mahmoud Abbas acted in contravention of the ruling of the Palestinian Supreme.

Issuing the same reason he gave for delaying the vote earlier this year, that the decision to postpone the local elections was made until better conditions were available to enable the election commission to work in all parts of the country.[115]

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[109] UN, United Nations, Economic and Social Council ("ECOSOC"), U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR*, para A.39, see http://www.cartercenter.org/des-search/des/Default.aspx.

[110] OSCE, *Copenhagen Document - Second Conference on the Human Dimension of the CSCE*, para 25.

[111] Chandani, Kirinde, "*LG polls: Politicians of all hues certain of victory amidst people apathy*", Sunday Times (Sri Lanka), 13 March 2011, :.

[112] Peiris, Vilani, "*Sri Lankan government holds belated local council elections*", 13 September 2011, World Socialist Web Site, http://www.wsws.org/Articles/2011/sep2011/slel-s13.shtml.

[113] "*Sri Lankan government to hold local government elections in Mullaitivu as soon as demining completed*", 11 October 2011, Colombo Page Sri Lanka Internet Newspaper, http://www.colombopage.com/archive_11B/Oct11_1318313222CH.php.

[114] Jaradat, Ahmad and Hodgson, Nikki, "Palestinian Elections Postponed Again", 31 August 2011, The Alternative Information Center, Palestine/Israel, http://www.alternativenews.org/english/index.php/topics/news/3790-palestinian-elections-postponed-again.

[115] Pran, Vladimir, "*Palestinian Local Elections 2011*", February 2011, International Foundation for Electoral Systems, http://www.ifes.org/Content/Publications/Papers/2011/Palestinian-Local-Elections-2011.aspx.

Following this decision Palestinian civil society groups took the case to the Palestinian Supreme Court, which ruled in favor of the Palestinian right to elections and declared that government postponement of the elections is illegal and that elections should therefore take place on their scheduled date of October 22, 2011. Further, Mr Abbas also stated that the Palestinian September bid at the UN was a justification of further delay of the elections.

Case focus: Jorge Landinelli Silva et al. v. Uruguay, 1978[116]
Suspension of political rights to vote and to run for public office
The complainants were all candidates for elective office on the lists of certain political groups for the 1966 and 1971 elections, which were later declared illegal through a decree issued by the new Government of the country in November 1973. It was argued by the complainants that the Institutional Act No. 4 of 1 September 1976 (Articles I (a))' had deprived them of the right to engage in any activity of a political nature, including the right to vote, for term of 15 years. They argued that such a deprivation of their rights goes beyond the restrictions envisaged in Article 25 of the Covenant, since suspension of political rights under the Uruguayan juridical system, as in others, is only permissible as a sanction for certain categories of penal crimes.

The Human Rights Committee saw no ground for the contention that such measures were necessary to restore peace and order and stated that "the Government…has failed to show that the interdiction of any kind of political dissent is required in order to deal with the alleged emergency situation and pave the way back to political freedom."[117] Acting under Article 5 (4) of the Optional Protocol, the Committee was of the view that, by prohibiting the complainants from engaging in any kind of political activity for a period as long as 15 years, the State party unreasonably restricted their rights under Article 25 of the Covenant.

3.3 The electoral calendar

The electoral calendar should be publicised as part of civic information activities, in the interests of transparency and of securing public understanding and confidence in the process.[118]

The dates set out in the electoral calendar for each phase of the process must allow adequate time for effective campaigning and public information efforts, for voters to inform themselves and for the necessary administrative, legal, training and logistic arrangements to be made.

This includes consideration of the time between the call for elections and the elections themselves. In this regard, principles governing the SADC envisage that:

> *The constitutional and legal framework should: provide that elections are held not fewer than 45 days and not more than 90 days from the call of the election date.*[119]

4 Genuine Elections

4.1 Genuine procedures

The right of citizen to vote and to be elected at genuine, periodic democratic elections is internationally recognised.

[116] *Jorge Landinelli Silva et al. v. Uruguay*, Communication No. 34/1978, U.N. Doc. CCPR/C/OP/1 at 65 (1985); http://www1.umn.edu/humanrts/undocs/html/34_1978.htm.
[117] (34/1978).
[118] UN Centre for Human Rights, *Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections,* 1994, para 75.
[119] EISA and Electoral Commission Forum of SADC Countries, *Principles for Election Management, Monitoring, and Observation in the SADC Region*, 7-8.

According to the Zimbabwean Election Support Network, genuine democratic elections are an, "*expression of sovereignty, which belongs to the people of a country, the free expression of whose will provides the basis for the authority and legitimacy of government.*"[120] They cite the **Declaration of Principles for International Election Observation and Code of Conduct for International Election Observers** as clarifying that genuine democratic elections "*serve to resolve peacefully the competition for political power within a country and thus are central to the maintenance of peace and stability.*"[121]

> **Article 21(3) UDHR**
>
> *The will of the people shall be the basis of the authority of government; this will be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.*
>
> **Article 25 ICCPR**
>
> *Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:*
> *[…]*
> *(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 *travaux preparatoires* of the ICCPR indicate that the drafters regarded this requirement as comprising of two broad elements.

The first is procedural and includes the guarantees considered above; of periodicity, equality and universality of suffrage and secrecy of the ballot.[122]

4.2 Genuine effects

The second element is focused on the outcome of the elections and defines genuine elections as those which reflected the free expression of the will of the electors.[123] According to the Carter Center,[124] while

> *"[…] the notion of genuine elections lies at the heart of democratic elections, the treaties provides little guidance about what constitutes a genuine election. It is generally understood to mean elections which offer voters a real choice, and where other essential fundamental rights are fulfilled."*

A genuine election is thus:

> *[…] a political competition that takes place in an environment characterised by confidence, transparency, and accountability and that provides voters with an informed choice between distinct political alternatives. A genuine democratic election process presupposes respect for freedom of expression and free media; freedom of association, assembly, and movement;*

[120] Bere, T, *"Promoting democratic elections and free and fair electoral processes in the SADC Region: The Zimbabwean Perspective"* (Zimbabwean Election Support Network) available at www.oamoz.org/Docs/Zimbabwe. ppt.
[121] http://www.cartercenter.org/des-search/des/Documents/NARRATIVEOFOBLIGATIONS.pdf at pg 6.
[122] For example, *Official Records of the General Assembly, sixteenth Session, Third Committee,* 1096th and 1097th meetings.
[123] Ibid.
[124] Davis-Roberts, A and Carroll, DJ, *"Democracy Program: Using International Law to Assess Elections"* (The Carter Centre, Atlanta, GA, USA), p. 8.

> *adherence to the rule of law; the right to establish political parties and compete for public office; non-discrimination and equal rights for all citizens; freedom from intimidation; and a range of other fundamental human rights and freedoms [...].*[125]

The right is emphasised in all key international legislation[126] and must be adhered to by State parties. Sham elections designed to temporarily quell dissent or avoid international scrutiny; restricted elections which do not include the nation's principal policy making offices would fall foul of this requirement.

According to the HCR

> *"elections must be calculated to bring about the transfer of power to prevailing candidates in accordance with a pre-arranged formula which acceptable to the people, whether by plurality, majority or super majority."*[127]

It must be for the people themselves to determine through elected or transitional bodies whether this will be accomplished through a majoritarian framework, proportional representation or other election system.

Finally, the actual transfer of power to the elected candidate must be committed to by all parties and implementation must be the subject of legal provisions. The elected party must be able in fact to exercise the power conferred on them by law.[128]

4.3 A real choice

Political pluralism is essential in providing the electorate with a real choice. For an election to be genuine, an actual choice must be offered to the electorate. A high degree of importance is given to it by the HRC when considering reports submitted for consideration by State parties to the ICCPR.[129]

The principle of genuine elections does not dictate that a particular political system be in place. Real popular input must be institutionally accommodated.

Both the UDHR and the ICCPR,[130] prohibit discrimination on the basis of "political or other opinion" in the enjoyment of the right to take part in government, the right to freedom of association and the right of assembly. The HRC has also noted that the ICCPR does not impose any particular electoral system, merely that:

> *[...] any system operating in a State party must be compatible with the rights protected by Article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another.'*[131]

UN General Assembly ("UNGA") Resolution 46/137 recognised that:

> *[...] there is no single political system or electoral method that is equally suited to all nations and their peoples and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question*

[125] OSCE, "*Election Observation Handbook*" (5th Edition). Available at www.osce.org/odihr/elections/70293.
[126] For example, Universal Declaration of Human Rights, Article 21 (1); ICCPR Article 25(a); Declaration on the Granting of Independence to Colonial Countries and Peoples, Article 2; ICCPR and ICESCR, Common Article1 (1).
[127] UN, "*Human Rights and Elections: A Handbook on the Legal, Technical and Human Rights Aspects of Elections" (Professional Training Series No.2)* (UN Doc. (1994)), p. 12, para 17.
[128] Article 21 UDHR; Article 25 of the ICCPR; Article 13 of the 1981African Charter, Art.and Article 11 of the 1994 Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections.
[129] *"Human Rights and Elections"*, op.cit. p.12.
[130] UDHR, Article19,ICCPR, Article19.
[131] Human Rights Committee, General Comment 25, para 21.

each State's sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preference of other States [...][.][132]

The concept of real choice is inherent in the 1962 Draft General Principles:[133]

a) *Every voter shall be free to vote for the candidate or list of candidates he prefers in any election to public office, and shall not be compelled to vote for any specified candidate or list of candidates. [...]*

b) *Full freedom shall be ensured for the peaceful expression of political opposition, and also for the organisation and free functioning of political parties and the right to present candidates for election.*

The HRC has stressed that the notion of effective rights applies also to the conduct of elections. Thus, those entitled to vote "*must be free to vote for any candidate, [...] free to support or to oppose government [...], [and] able to form opinions independently*."

Practical Considerations

This implies:

- ☒ The absence of undue influence or coercion, violence or threat of violence, compulsion, inducement or manipulative interference of any kind.[134]
- ☒ An "independent electoral authority" should be established.
- ☒ States should take measures to ensure the secrecy of the ballot, including in the case of any permitted absentee voting, the security of ballot boxes must be guaranteed, and votes counted in the presence of candidates or their agents.
- ☒ The confidence of electors in the system in turn requires judicial review or equivalent process.[135]

Political pluralism requires the parties in the election be able to function effectively and without hindrance, including the protection of the law. To assist the full participation of parties, electoral law should provide for fair and transparent funding of political campaigns (which may include some form of public funding). The HRC considers that limitations on campaign expenditure may be justified to ensure that free choice or the democratic process is not undermined. [136]

The Council of Europe issued guidance on the financing of political parties and their campaigns. In essence, the following guidance may be helpful:

a) Within reasonable limitations, candidates should be able to contribute to their own campaigns.[137]
b) Reasonable limitations may be placed on private funding contributions to level the playing field during campaigns, and set out the maximum threshold on the amount of money that may be accepted from a single source.[138]
c) A limit may be put on the total sum of private donations.[139]

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[132] A/RES/46 /137 dated 17 December 1991: *Enhancing the effectiveness of the principle of periodic and genuine elections.*
[133] 1962 *Draft General Principles on Freedom and Non-discrimination in the Matter of Political Rights adopted by the Sub-Commission of Minorities*; Principle VIII.
[134] The Human Rights Committee, *General Comment 25*, para 19.
[135] The Human Rights Committee, *General Comment 25*, para 20.
[136] See Goodwin-Gill, G, *"Codes of Conduct"*, section 2.1. Available at www.ipu.org/PDF/publications/CODES_E. pdf.
[137] CoE, *Report on the Participation of Political Parties in Elections*, para 31.
[138] CoE, *Financing Political Parties and Election Campaigns: Guidelines*, p. 22.
[139] *ibid*, p. 22.

d) Cash donations should be prohibited, and States should consider introducing rules which define acceptable sources of donations to political parties or candidates.[140]
e) Further, States should consider limiting or prohibiting donations from anonymous sources, and should regulate funding from foreign donors.[141]
f) Transparency of donations should be ensured in all aspects.[142]

4.4 Equal access to public service

The Article 21 UDHR and Article 13 of the African Charter of Human and People's Rights ("African Charter") provide that everyone has a right to equal access to public service. The ICCPR takes the right further, stipulating that every citizen has the right to be elected to public office, and to have access, on general terms of equality, to public service in his country.[143] Impermissible restrictions on a person's ability to stand for public office not only violate this right but also interfere with the right of the electorate to choose.

The right of access to public service and to stand for election is subject to requirements of non-discrimination in respect of race, gender, religion or other arbitrary classifications. Certain requirements for public office are permissible if reasonable, for instance minimum age and mental capacity.[144]

Racial and gender restrictions on access to public service are prohibited by the ICERD the ICESCR;[145] the Declaration on the Elimination of Discrimination against Women ("DEDAW");[146] the Convention on the Elimination of All Forms of Discrimination against Women ("CEDAW");[147] and the Convention on the Political Rights of Women ("CPRW").[148]

The CEDAW Committee has affirmed that the effective exercise of these rights will, on the other hand require measures of positive or affirmative action. The CEDAW Committee has recommended that States consider measures, such as positive action, preferential treatment or quota systems, 'to advance women's integration into education, the economy, politics and employment'.[149] This can take the form of "temporary special measures".[150] The HRC's position is restated in stronger terms in General Recommendation 23. The HRC also has recognised that affirmative measures may be taken in appropriate cases to ensure equal access.[151]

The combined application of the above provisions establishes the broadest reasonable pool of candidates for elections, thereby yielding assurances of genuine choice for voters and of the individual rights of candidates to stand for election and to enter public service.

The HRC recognised that while some countries have permissible legislative penalties depriving violators of certain political rights, the test of proportionality was still to be applied in examining the

[140] *ibid*, p. 22.
[141] *ibid*, p. 22.
[142] *Ibid,* p. 22.
[143] 1981 African Charter, Article 25 (b) and (c).
[144] Records of discussions held during the drafting of these provisions are clear on this interpretation. For example, see the summary records of 363rd to 367th meetings of the Commission on Human Rights, held at its ninth session in 1953 (E/CN.4/SR.363-E/CN.4/SR.367).
[145] Article II (c).
[146] Article4 (a) and (c).
[147] Article7 (a) and (b).
[148] Articles II and III.
[149] See CEDAW, General Recommendation No. 5 (7th session, 1988), "*Temporary Special Measures*" in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies* UN doc. HRI/GEN/1/Rev.7, 12 May 2004, 225.
[150] CEDAW, *General Recommendation No. 23*, (1997), paras 13-15: "The formal removal of barriers *and* the introduction of temporary special measures to encourage the equal participation of both men and women in the public life of their societies are *essential prerequisites* to true equality in public life."
[151] HRC, *General Comment 25*, para 23.

degree of deprivation. The HRC stated, *"…the principle of proportionality would require that a measure as harsh as the deprivation of all political rights for a period of 15 years be specifically justified."*[152]

Case Focus: Canada[153]
Mikmag Tribe participation in Constitutional Conferences
The scope of the right to specific representation was considered in Grand Chief Donald Marshall et al. (Mikmaq people) v. Canada . The authors were the representatives of the Mikmaq tribe of Canada. They claimed to be an independent people with the right to self-determination under the UN Charter. The issue concerned the authors wish to attend Constitutional Conferences by the Government of Canada to which elected federal leaders and leaders of the ten provincial governments normally attended. The Canadian Government had an as exception invited some tribal aboriginal leaders. The authors claimed that these tribal leaders were not the representatives of the Mikmaq society and claimed the right to represent their tribe at such Conferences.

The issue before the HRC was whether the Constitutional Conferences constituted a "conduct of public affairs" and if so, whether the authors or any representatives of the Mikmaq people had the right by virtue of Article 25(a) of the ICCPR to attend the Conferences. It was held that there was no violation of Article 25(a).

In the above case, the HRC agreed that, considering the composition, nature and scope of the conferences – the Conferences did in fact, constitute a conduct of public affairs. The HRC however, recognised the limitation on the interpretation of Article 25 (a) of the ICCPR as one that did not provide for the unconditional right to choose the mode of participation in the conduct of public affairs:

> *5.4. It remains to be determined what is the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives. Surely, it cannot be the meaning of Article25(a) of the Covenant that every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.*
>
> *5.5. It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law….Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, Article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of Article 25(a).*

Whilst the above decision highlights the importance of respect for the legal principles of a State with regard to political participation, its application may be limited as it concerned a constitutional process as opposed to an election.

4.5 An informed choice

In order for choice of governance to be free it must be properly informed. To enable individuals to decide upon a candidate and express their decision through an election, access to information about the candidates, parties and the process is therefore critical element of genuine elections.

[152] *Alba Pietroroia v. Uruguay* (44/1979) *Selected Decisions….,* vol. 1, p. 79, para 16.
[153] Communication No. 205/I986. 4 November 1991. CCPR/C/43/D/205/I986.

Amongst the matters which comprise proper non-partisan civic education, voters should be able to understand the practicalities of registration and voting as well as answer questions as to why they should participate and the guarantees in place to protect their right to participate confidently in the process. According to Bere of the SADC, the "Zimbabwe government does not appear to have recognised the vital need and importance of civic and voter education nor to have adequate resources for this purpose."[154]

The aim of voter education is to make information available and accessible to all constituents. Voter education campaigns should seek to achieve universal coverage of the electorate and this requires:

> *[…] reaching out to disadvantaged groups as well as mainstream voters. For example, voter education should take into account factors such as high rates of illiteracy or the use of different languages in a country, even if there is only one official language. Minority groups, internally displaced persons and other marginalized segments of society should be specially targeted. Young adults eligible to vote for the first time may need special messages explaining how to register and cast a ballot. Voter education should also include publicity encouraging people to vote…*[155]

It should also create a culture where women are encouraged to partake in the electoral process. All concerned should understand that "family voting" i.e. a practice where one family member votes on behalf of the entire family unit, is not in keeping with democratic principles. In fact, one measure of election legitimacy is the degree to which the electorate is informed about:

* Voter rights and obligations;
* Dates and procedures of the election;
* The range of options (e.g., policies, parties or candidates, etc.) from which voters can choose;
* The significance of these choices.[156]

Civic education extends to those who carry out specific functions in relation to the election process, such as registration and polling officials, police and security personnel, the media and political parties. Training tailored both for the group in question and in the context of elections as well as the provision of specific information may be required in these circumstances.

In order to ensure a fully informed choice is made, it is essential to ensure that each party and candidate is accorded sufficient and fairly distributed access to the mass media. Under The 1994 Inter-Parliamentary Union Declaration on Criteria for Free and Fair Elections Article 3(4): *"Every Candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views."* Considerations for this requirement include the fair allocation of broadcast space and air time to each. This includes the consideration of placement and timing, such as whether a candidate is featured on the front or back page of a newspaper or whether a candidate is awarded a prime-time slot for a party political broadcast.

An informed choice implies that the content of the media campaigns should be responsible, that is to say that parties and candidates should not be permitted to make statements which are false, slanderous, racist or which constitute incitement to violence.[157] Unrealistic or disingenuous promises should not be made nor should false expectations be fostered by partisan use of the mass media.

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[154] Bere, T, *"Promoting democratic elections and free and fair electoral processes in the SADC Region"* op.cit.
[155] At: http://www.un.org/womenwatch/osagi/wps/publication/Chapter5.htm.
[156] Jennings, K, "*The Role of Electoral Management Bodies in Supporting Voter Education: Lessons Learned and Challenges: "Education for Participation?*", Mexico, National Democracy Institute for International Affairs, 1999.
[157] The 1994 IPUDCFFE, Article 9.

5 Electoral Laws and Procedures

5.1 Legal and technical issues

Ensuring that the elections are genuine in terms of the matters outlined above, requires the declaration of a policy of broad access to public office and the expression of an intention to adhere to international standards. To carry out such intention legal and technical measures must be implemented at a practical level. The UN support in this regard focuses on the legal, technical and human rights aspects of the elections. Within this overall context, the objectives of UN electoral assistance have been described as follows:

a) *To assist Member States in their efforts to hold credible and legitimate elections in accordance with internationally recognised criteria;*

b) *To contribute to building, in the recipient country, a sustainable institutional capacity to organize democratic elections that are genuine and periodic and have the full confidence of the contending parties and the electorate.*[158]

National constitutions provide for these basic elements and ensure that elections are carried out in accordance with the rule of law.

According to the UN,[159] vital aspects should include:

* **Election administration** – Legal provisions should ensure that an unbiased, independent and effective administrative structure is in place. Legal guarantees should insulate electoral administration from bias and corruption;
* **Constituency delimitation** - The process of identification of electoral districts and boundaries should respect the international normal of equal suffrage and polling stations should be distributed to guarantee equal access within every constituency;
* **Registration of electors** – Where there is to be advance registration of voters, there should be fairness and effectiveness of provisions concerning elector qualifications, residence requirements, election lists and registers, and the means provided for challenging such documents. Disqualifying factors must not allow impermissible discrimination;
* **Nominations, Parties and candidates** – Laws should be in place to ensure that no unfair advantage is gained by government-supported candidates. Political parties should not face unreasonable restrictions on participation of campaigning;
* **Polling, tabulation and reporting** – There should be detailed provisions regarding the form of ballots, the design of ballot boxes and voting compartments, and the manner of polling. These stipulations should guard against fraud and ensure secrecy of ballot. Ballots must be clearly worded and identical in every language. Furthermore, sufficient quantities of voting materials must be available at each polling place and counting should be open to official observation by all concerned parties;
* **Complaints, petitions and appeals** – The law must provide the right to challenge election results and to seek redress;
* **Respect for fundamental human rights** – Guarantees of free speech, opinion, information, assembly, movement and association take on greater significance during elections. The overriding atmosphere must therefore be one of respect for human rights and be

[158] "*Enhancing the effectiveness of the principle of periodic and genuine elections*", Report of the Secretary-General, UN doc. A/56/344, 19 October 2001, Annex II, Department of Political Affairs of the United Nations Secretariat and the United Nations Development Programme, *Note of guidance on electoral assistance*, para 3. Annex I provides a summary of electoral assistance activities between 1 October 1999 and 31 July 2001; Goodwin-Gill, G, "*Free and Fair Elections*" (New Expanded Edition) (Geneva, Inter-Parliamentary Union, 2006).

[159] "*Human Rights and Elections*", op.cit. p.15-16.

characterised by an absence of intimidating factors. Laws including emergency legislation which may in effect discourage political participation should be repealed or amended;

* **Offences, penalties and maintenance or order** – National laws must safeguard the political process from corruption, obstruction, undue influence, bribery, intimidation and all other forms of corrupt practice;
* **Media access and regulations** – Arrangements for fair media access for all candidates needs to be in place. This implies equality of time and space, attention to the hour of broadcasting and placement of printed advertisements (i.e. front verses back page). An agreed code of conduct for the media can assist to this end;
* **Public, information and voter education** – Funding should be in place for non-partisan voter education and information campaigns. Literature should be widely available in all national languages;
* **Observation and verification** – Observation and verification of election preparations, voting and counting by representatives of political parties and candidates should be widely provided for in election legislation. Where observers are invited, the national laws must permit their presence; and
* **Legal authority and structure** – The Constitution and other high organic State laws must provide guarantees for the fundamental right of periodic free and fair elections with universal, equal and non-discriminatory suffrage, secret balloting and the right to be elected and to have access to public office on equal terms. Fundamental human rights must be enshrined in the highest laws of the land in clear and concise language.

5.2 Nominations, Parties and Candidates

Provisions concerning candidate qualifications must be clear and must not discriminate against women or particular racial or ethnic groups. Any disqualifications should be subject to independent review.

Political parties should not face unreasonable restrictions on participation or campaigning and must be free from interference. Any such restrictions should State in clear language. There should be protection under the law for party names and symbols. Procedures for designation of party agents, for nomination time and place requirements and for campaign financing should be clearly established by law. In addition, the electoral calendar should provide adequate time for campaigning and public information efforts.

Elections are a means of translating the general will of the electorate into representative government. Electoral laws and procedures should guard against unfair advantage being bestowed upon Government supported candidates. To achieve this objective it is necessary that all parties and candidates be able to put out their manifestos, the political issues and their proposed solutions, freely to the electorate during the electoral campaign.

As the campaign period is crucial to achieve the above objectives, it is crucial that the legal framework regulate the conduct of political parties and candidates during electoral campaigns. The legal framework should ensure the following;

* there are no unreasonable restrictions on the right to freedom of expression and any restrictions there are must be set out in the law;
* every party and candidate has equitable access to the media, especially to undertake their campaign;
* every party and candidate has equitable access to resources to undertake a credible election campaign;

* no party or candidate (especially the ruling party) is favoured, financially or otherwise through the availability or use of State resources, over the other parties and all stakeholders in the election process have an equal chance of success;
* no party or candidate threatens or does violence to another party or candidate, or incites anyone to violence or otherwise impedes the freedom to campaign. The legal framework should therefore ensure there are procedures and mechanisms to deal with complaints and disputes during the campaign and that there are provisions and safeguards to avoid electoral violence and that the electorate and other candidates and parties are not intimidated accordingly.

5.3 Polling, Tabulation and Reporting

Central to the successful free and fair election is the actual poll. This requires detailed provisions relating to all aspects of polling such as the form of the ballots, the design of ballot boxes and voting compartments and the manner of polling.

The international standard for a democratic election requires that votes be cast by secret ballot or by other equivalent free, secret voting procedure. The provisions in the legal framework regulating control and security of the ballot, as well as the provisions governing the casting of a ballot at the polling station, should therefore ensure ballot security, while at the same time ensuring that no individual ballot can be identified as having been marked by a specific voter.

The legal framework should ensure the accurate recording of ballots. Ballots should be worded with absolute clarity and be identical in all languages. Ballot form should also take into account various levels of literacy in the country. Proxy and absentee voting provisions should be designed to encourage the broadest possible participation, without compromising electoral security. Voters with special needs, including the disabled, the elderly, students, conscripts, workers (including migrant workers out of the country), foreign-service personnel and prisoners who have retained voting rights, should be accommodates.

The legal framework should ensure that polling stations are accessible. At each polling place, sufficient quantities of voting materials must be available... Polling personnel will require clear guidance in admitting and identifying qualified voters. Permissible questions to be put to voters at polling places should be expressly set out by statute, to prevent voter intimidation, abuse of discretion, or discriminatory application. The attendance of observers should be provided for.

A fair, honest and transparent vote count is a cornerstone of democratic elections. Thus, the legal framework should ensure that all votes are counted and tabulated accurately, equally, fairly and transparently.

Counting should open to official observation of concerned parties, candidates and election observers so that the entire process by which a winner is determined is fully open to public scrutiny. The legal framework must clearly State the electoral formula that will be used to convert votes into legislative seats.

Thresholds, quotas and all details of the electoral formula must be stated clearly and all possibilities, such as ties, withdrawals or death of a candidate, must be addressed The processes for counting votes, verification, reporting of results and retention of official materials must be secure and fair. All issued, unissued and damaged ballot papers must be systematically accounted for.

Regardless of whether ballots are counted at the polling station or at a central counting location or at both places, the representatives of parties and candidates and election observers should be permitted to remain present on this occasion. Where technology is used to count ballots, the legal framework should provide safeguards and overview procedures in any case must be in place to ensure accuracy and reliability.

The law must also allow objections to counting procedures, including objections to criteria used to determine the validity of ballots. Re-count procedures should be available in case of questionable results. Finally, alternative independent verification procedures, such as parallel vote tabulation, can be a valuable measure contributing to public confidence in, and acceptance of, the outcome of polling.

The legal framework for elections should clearly specify that the representatives of parties and candidates and election observers be given, as far as practicable, certified copies of tabulation and tally sheets. The legal framework should provide procedures for transferring the certified copies, results of counting, ballot papers and other election materials from polling stations and other, lower levels of EMBs to intermediate and higher EMBs for consolidation and safekeeping. The law should require that the vote counts be available in counting and tabulating votes tables or similar format and that the tabulation for any polling station should provide detailed information such as the number of ballots used and returned, the number of blank, spoiled and invalid ballots, and the number of votes for each political party or candidate. This degree of detail is necessary to enable the representatives of parties and candidates and election observers to track results and locate specifically, if fraud has occurred, where the numbers have been unlawfully changed during the consolidation processes.

The law should provide for timely publication of results as this may be crucial for its acceptance by all contenders. In extreme circumstances however, publication of election results at the polling station level might jeopardize the safety of voters or polling station committee members in that community. Thus, the law may provide limited exceptions to these principles in order not to place voters at risk of personal harm.

5.4 Complaints, Petitions and Appeals

The right to challenge election results and for aggrieved parties to seek redress should be provided by law. Legal provisions should ensure arrangements to hear petitions related to election results[160] and should provide clear grounds upon which complaints and appeals are allowable[161] setting out the scope for available review, procedures for its initiation and the powers of the independent judicial body charged with such review. Legal provisions should define and govern the right to demand a recount;[162] provide an opportunity to challenge and invalidate all or part of the election results.[163] Multiple levels of review, where appropriate, should be described as well. The effect of irregularities on the outcome of elections must be established by law. Anyone alleging a denial of their individual voting or other political rights must have access to independent review redress.

Remedies should be available for complaints arising throughout the electoral process.[164] The legal framework should ensure that remedies, when granted are effective. Effective redress requires disputes to be dealt with in a timely manner,[165] and that States must enforce the remedy when granted.[166] Cessation of a violation is an essential element of an effective remedy.[167] Such sources also indicate that an effective remedy requires reparation, and at times may require States to take interim measures.[168]

[160] ECOWAS, Protocol on DGG, Article 7
[161] OSCE/ODIHR, Legal Framework, p. 36
[162] CoE, Handbook, para. 4.8
[163] SADC, Principles and Guidelines, para. 2.1.10
[164] ECOWAS, Protocol, Article 7
[165] AU, African Charter, Article 7
[166] UN, ICCPR, Article 2
[167] UNHRC, General Comment 31, para 15
[168] UNHRC, General Comment 31, paras 16, 19

5.5 Observation and Verification

It is important to allow for a sufficient number of observers to ensure their presence at an adequate number of polling places and election events. Effective, independent co-ordination of observer activities enhances their positive value. The meaningful involvement of observers also requires their presence from the beginning of the process, their adequate training and measures to ensure that they are informed as to the local culture.

The observation and verification of election preparations, voting and counting by representatives of political parties and candidates should be widely provided for in election legislation. In addition, the presence of non-partisan election observers from national non-governmental organizations and international organizations can help secure public confidence in the electoral process. If observers are to be invited, their role should be clearly described in Public information materials. Whether drawn from the UN system, from regional intergovernmental organizations, from non-governmental organisations or from official missions from other States, observers should be afforded free movement and access and be protected from harm or interference with their official duties.

The legal framework should clearly State that party and candidate representatives are permitted to observe proceedings, not to campaign or otherwise participate in voting. All legal restrictions on campaigning within the polling station area -- such as communication with voters, distribution of partisan material, wearing of badges or apparel, or public broadcasts that can be heard within the polling station -- must be enforceable. The law must clearly State whether the representatives of parties and candidates are to be allowed to handle any election document at any stage, as well as any penalty for mishandling. The legislation should provide that the representatives of parties and candidates are subject to the authority of the polling station committee president and staff.

The legal framework should generally provide rights to duly accredited representatives of parties and candidates in polling stations including:

* to remain within the polling station while lawfully carrying out their functions and enter and leave the polling station at any time, subject to restrictions on the number of representatives for any one party or candidate;
* to observe all activities with the exception of the marking of ballots by voters within the polling station, from the check counting of ballots and sealing of ballot boxes prior to the commencement of voting to the final packaging of material after close of voting;
* to challenge the right of any person to vote;
* to query any decisions made by polling officials with the polling station committee president and election management officials.

5.6 The Role of Observers

Election monitoring is the observation of an election by one or more independent parties, typically from another country or a non-governmental organization, primarily to assess the conduct of an election process on the basis of national legislation and international standards. Election observation can be defined as:

> *the purposeful gathering of information regarding an electoral process, and making informed judgements on the conduct of such process on the basis of information collected, by persons who are not inherently authorized to intervene in the process and whose involvement in mediation or technical assistance activities should not jeopardize their main observation responsibilities.*[169]

The ACHPR has re-iterated the necessity of observers to free and fair elections. In *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, it had to consider the annulment of the

[169] Ibid, paras 89-90.

June 1993 elections and the ousting of the jurisdiction of the courts by the Federal Military Government. The Commission expressly noted that both foreign and local observers had found the elections to have been free and fair, while the government had been unable to give any explanation of alleged irregularities:

> *A basic premise of international human rights law is that certain standards must be constant across national borders, and governments must be held accountable to these standards. The criteria for what constitutes free and fair elections are internationally agreed upon, and international observers are put in place to apply these criteria. It would be contrary to the logic of international law if a national government with a vested interest in the outcome of an election, were the final arbiter of whether the election took place in accordance with international standards.*[170]

The role of observers to the electoral process is prescribed in **the Framework for Future Efforts at Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections**, adopted by the Commission on Human Rights in 1989. In section III, it provides that *"National institutions should ensure universal and equal suffrage, as well as impartial administration."* In section IV, it elaborates that this may require that the host country to "*invite observers or seek advisory services. Either or both may be available from regional organizations or from the United Nations system*."

The general guiding principles are that election observation must:

* respect the sovereignty of the host country;
* be non-partisan and neutral;
* be comprehensive, particularly in reviewing the election;
* be transparent;
* be accurate and professional. The legal framework may provide for a code of conduct for the representatives of parties and candidates to ensure orderly conduct on polling day within polling stations and during the counting at the counting station.

Election observers fall into two categories: national and international and their benefits, particularly for evolving democracies cannot be overstated:

* They provide an effective means of verifying the genuineness of the election outcome and
* Their presence reduces the likelihood of intimidation and fraud.
* They can serve to instil confidence in the electorate which in turn increases their willingness to participate in the electoral process.

5.6.1 National Election Observers

National observers are playing a key and increasing role. They come from civil society groups (such as church groups, women's and youth organisations and NGOs) and should be assigned the necessary facilities in order to carry out their functions. The legal framework should provide clear and objective criteria for registration and accreditation and be clear as to the authority of the observers, the requirement for obtaining observer status and the circumstances in which the status may be revoked.

- ☒ The law should be unambiguous in establishing the observers rights to inspect documents, attend meetings, observe election activities at all levels and at all times and to obtain the required documentation.

Timely corrective relief needs to be available in such circumstances where accreditation is refused.

[170] *Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*, ACHPR, Communication. No. 102/93 (1998), para 47.

National legislation must clarify in precise terms the observer rights and duties and "*strike a balance between the rights of the observers and the orderly administration of the election process*" without "muzzling" the observers or hindering their ability to report their findings.[171]

5.6.2 International Election Observers

An international election observation is "*neither a right, nor as yet a recognised international standard*" and unless it occurs as part of a broader human rights observation, requires a formal invitation by the State party[172]. Regional and international agreements may however require countries to allow international observations and in such cases the law must make appropriate provision for them.

In order to observe effectively international organisations involved expect assurances from the host government that an election observation mission will be able to carry out its duties safely, in a timely manner and specifically to:

* Establish a mission within a time frame that permits observation of all phases of the election process;
* Decide at its own discretion the number of observers necessary to mount a viable observation mission;
* Receive accreditation for all its observers through a simple and non-discriminatory procedure;
* Obtain all necessary information regarding the electoral process from authorities at all levels in a timely manner;
* Meet with candidates, members of all political parties, representatives of civil society, and with all other individuals of its choice;
* Have the freedom to travel in all regions of the country during the election process and on election day, without any restriction or prior notification;
* Have unimpeded access to all polling sites, election commissions, and counting and tabulation centres throughout the country; and
* Be able to issue public statements.[173]

As of yet, there are no binding international standards for election monitoring although the Carter Center working alongside the United Nations Electoral Assistance Division and the National Democratic Institute ("NDI") has worked on building consensus on a common set of international principles for election observation.[174]

6 Other Requirements

6.1 The Role of Police and Security Forces

The right to Security of the Person is established in international and regional treaties and is applicable throughout the electoral process.[175] It requires that individuals be free from physical and mental violence at all times and be free of arbitrary arrest and detention[176]. Other sources go

[171] IDEA, op.cit. p.90.
[172] Ibid, p. 91.
[173] OSCE, "*Election Observation Handbook*" (5th Edition). available at www.osce.org/odihr/elections/70293.
[174] "*Democratic Election Standards: Development of Standards for International Election Observations*",available at http: cartercenter.org/peace/democracy/des_development.html.
[175] For example, OB; UN, ICCPR, Art. 9; AU, African Charter, Art. 6; OAS, ACHR, Art. 7(1); LAS, Arab Charter on Human Rights,Art. 14; CIS, Convention on Democratic Elections, Art. 8, CoE, ECHR, Article 5.
[176] *Narrative of Obligations*, The Carter Center, Draft of December, 2009, p. 30, http://www.cartercenter.org/des-search/des/Documents/NARRATIVEOFOBLIGATIONS.pdf.

further and include a requirement that law enforcement officials behave in a neutral manner throughout the electoral process.[177]

For the electoral process to be effective, security forces need to be involved in all phases of the electoral process (pre-electoral, electoral and post-electoral) and protect persons, property, election materials, officials and institutions and help to solve certain logistic problems. Hounke and Gueye sub-divide their functions into three categories:[178]

1. Static functions: for example, protection of immovable property;
2. Dynamic functions: for example, ensuring the security during the transportation of election materials; and
3. Emergency functions: i.e. stand-by forces that can be mobilized at any time when the need arises.

Furthermore, they list four types of requirements necessary to ensure useful involvement of security forces in electoral processes. These are:

* **Behavioural requirements**: adoption of republican behaviour, especially knowing how to meet security needs of the said process, respecting the principles and values on which the Republic is founded (total guarantee and compliance with laws and regulations in force, ensuring the security of the electoral process with equity and neutrality;
* **Legitimacy requirements**: legality of participation in accordance with to the laws, regulations and procedures that help to create a favourable environment that will encourage staff of the security forces to adopt behaviours expected of them (reasonable that will encourage staff of the security forces to adopt behaviours expected of them (reasonable degree of responsibility in order to pre-empt the development of a culture of impunity detrimental to the forward march of democracy;
* **Competence requirements**: ability of staff of the security forces to provide the services required and adapted by a structured organization, by appropriate skills to ensure the security of the electoral process, and with the necessary quantitative and qualitative staff strength; [and]
* **Resource requirements:** provision of the necessary (financial, material and human) resources requires special attention, for the provision or improvement of existing equipment is necessary for the fulfilment of the missions of the security forces. They need vehicles, communication tools, per diem and others particularly on time. [Emphasis added][179]

Police and security forces perform two vital functions during the election process. The effective administration of justice requires a careful balance between the need for electoral security and maintenance of order whilst at the same time ensuring the non-interference with rights and the existence of an environment free of intimidation.

To break-down the specific parts of the electoral process, during:

* **Candidacy and Campaigning –** they must ensure that public employees are not coerced to vote in favour of a given candidate[180] and protect the candidates[181] as well as the public;
* **Voter Operations –** they must ensure individuals are free to vote for candidates of their choice without undue influence or coercion of any kind which may distort or inhibit free expression;[182]

[177] OS: EU, Handbook (2nd Ed.), p. 52.
[178] Hounke, M and Gueye, AB, *"The Role of Security Forces in the electoral process: the case of six West African countries"* (Nigeria: Friedrich-Ebert-Stiftung, 2010) p. 31.
[179] Ibid, para 2.1 to 2.3.
[180] OS: OSCE/ODIHR, Handbook (5th Ed.) p. 47.
[181] OS: IPU, Declaration on Criteria for Free and Fair Elections, Article 3.
[182] IN: UNHCR, General Comment 25, para 19.

* **Voter Registration –** their role extends to ensuring that there is no interference with registration, intimidation or coercion of voters;[183]
* **Vote Counting –** they must enable counting to take place in an environment free from intimidation;[184] and during
* **Media Reporting –** they must adhere to State political commitments which extend the right of Security of the Person specifically to members of the media.[185]

The **Code of Conduct for Law Enforcement Officials** adopted by the UNGA in 1979 addresses both functions in its provisions. Article 1 imposes duty of service upon all officers of the law. This implies the duty to keep out forces which seek to disrupt or undermine the free expression of popular will. Article 2 provides that: "*law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.*"This requires respect for human rights thereby ensuring prevalence of an atmosphere free from intimidation.

Article 7 of the Code requires the officers to "*rigorously oppose and combat*" any act of corruption hence, imposing a duty to prevent election fraud, bribery, intimidation and acts designed to prevent expression of voter will. Article 7 also provides that law enforcement officials *"shall not commit any act of corruption."*

It is suggested that the role of the police should be subordinate to that of the polling officers and their presence should be discreet, professional and disciplined.[186] In order to prevent electors from feeling intimidated, discouraged or in fact impeded from casting their vote, police should be located in the minimum number necessary and in discreet positions.

The role of the security personnel is thus a critical one. State parties must ensure all those involved in the electoral process are offered security by such officials without meddling from them.[187]

7. Media Access and Regulation

Providing fair media access (print or electronic forms) by candidates and parties is an important focus of electoral law so that the general public can be informed of the political views and goals of all parties and candidates in a fair and unbiased manner. This is especially important where the major information media are government-controlled. The legal framework, whether under media or electoral law, should ensure that all political parties and candidates have equitable access to the media and be treated equitably by the media owned or controlled by the state.

Legal provisions should therefore prohibit and provide for safeguards against political censorship, unfair government advantage, biased coverage or preferential treatment and unequal access during the campaign period, with penalties or corrective mechanisms defined. The acceptable international standard for equitable media access is that of non-discrimination. The legal framework must provide that no party or candidate shall be discriminated against in terms of access to the media. Hence fair media access implies not only equality of time and space allotted, but also attention to the hour of broadcasting (that is, prime-time versus late broadcasting), the placement of printed advertisements (that is, front page versus back page) and where paid advertising is permitted, whether there is overcharging for political advertising. The legal framework must ensure that the ruling party does not get disproportionately large media coverage in the guise of news or editorial coverage.

[183] IN: UNHRC, General Comment 25, para 11.
[184] OS: EU, *Handbook for EU Election Observers*, p.82.
[185] PC: OAS, *Inter-American Principles on Freedom of Expression*, Principle 9.
[186] *"Human Rights and Elections"*, op.cit. p. 14.
[187] IDEA, *"International Electoral Standards: Guidelines for reviewing the legal framework of elections"* (Sweden, International Institute for Democracy and Electoral Assistance,2002), p. 72.

Moreover, fair media use implies responsibility on the part of all persons or parties delivering messages or imparting information via the mass media (that is truthfulness, professionalism and abstaining from false promises or the building of false expectations).

Electoral law should also ensure that no unreasonable limitations are placed on the right of political parties and candidates to free expression during election campaigns. Any law regulating defamation of character or reputation should be limited to the civil law. Any provision that imposes disqualification or imprisonment or monetary fines for criticizing or "defaming" the government, another candidate or a political party may be subject to abuse. The only exception may be the specific prohibition of inflammatory speech calculated to incite violence or hatred against another person or group.

A valuable mechanism for assuring fair and responsible broadcasting during election periods is an independent body charged with monitoring political broadcasts, broadcast civic education programmes and allocation of time to various political parties, as well as receiving and acting upon complaints regarding media access, fairness and responsibility. This function might be discharged by representative transitional bodies, by the electoral administration, or a by a separately constituted media commission.

Securing responsible electoral broadcasting and publication in the media can, in part, be served by agreement on a code of conduct for the media. Such codes may be preferable as a method of media regulation to legislative or governmental action, which might raise the issue of impermissible censorship and interference with the human rights of freedom of information and expression.

C. PREREQUISITE RIGHTS

A genuine democratic election process presupposes respect for freedom of expression and free media; freedom of association, assembly, and movement; adherence to the rule of law; the right to establish political parties and compete for public office; non-discrimination and equal rights for all citizens; freedom from intimidation; and a range of other fundamental human rights and freedoms.[188]

The International Bill of Rights enunciates those rights which are necessary to establishing an atmosphere conducive for free and fair elections.

These rights are of paramount importance in the context of elections. Those which merit special consideration in this context are the rights to free opinion, free expression, information, assembly and association, independent judicial procedures and protection from discrimination.

In addition to the voting procedures of an election, for the conduct of elections to be fair political propaganda, voter education activities, political meetings, rallies and partisan organisations are all essential aspects of an election process and must be able to operate without unreasonable interference.

Judicial functions of hearing petitions, objections and complaints in respect of elections must be protected from illegitimate interference. Equal participation in elections must be ensured through the implementation of non-discriminatory measures.

8. Freedom of Expression

The right to freedom of expression is a recognised fundamental human right. It is of crucial importance to the functioning of democracy and is a necessary pre-condition for the exercise of other rights and freedoms. In its own right, it is of central importance in human autonomy and dignity.

The right to freedom of expression is enshrined in all international and regional human rights treaties and was universally declared to be a right of the highest importance in the UDHR. The HRC, the body established to monitor the implementation of the ICCPR, has held that the "right to freedom of expression is of paramount importance in any democratic society."[189]

Article 19 UDHR

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 19 ICCPR

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds,

[188] OSCE, "*Election Observation Handbook*" (5th Edition). Available at www.osce.org/odihr/elections/70293.
[189] *Tae-Hoon Park v. Republic of Korea*, 20 October 1998, Communication No. 628/1995, para 10.3.

regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

3. The exercise of the rights provided for in paragraph 2 of this Article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:

(a) For respect of the rights or reputations of others;

(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 9 ACHPR

1. Every individual shall have the right to receive information.

2. Every individual shall have the right to express and disseminate his opinions within the law.

Article 10 of the ECHR, Article 5(d) (viii) of the ICERD and Article 13 of the CRC also express the right of freedom of expression in a similar manner.[190]

Guarantees of freedom of expression are also found in the vast majority of national constitutions. The ACmHPR, the intergovernmental body that supervises implementation of the Charter, has adopted an authoritative declaration setting out the main principles of freedom of expression that follow from Article 9 of the Charter. This is the **Declaration of Principles on Freedom of Expression in Africa** ("DPFEA").[191]

The ACmHPR has emphasised "*the fundamental importance of freedom of expression and information as an individual human right, as a cornerstone of democracy and as a means of ensuring respect for all human rights and freedoms*"[192] and it has stressed that, *"laws and customs that repress freedom of expression are a disservice to society.*"[193]

Case focus: Constitutional Rights Projects, Civil Liberties Organisation and Media Rights Agenda v Nigeria, ACHPR[194]

Freedom to receive information and to express and disseminate opinions within the law

According to the Communications, on 5 September 1994 the military government of Nigeria ("Nigeria") issued three military decrees, Decrees No. 6, 7, and 8, proscribing over thirteen newspapers and

[190] It is noteworthy in this context that the United Nations Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms, adopted by General Assembly resolution 53/144 of 9 December 1998, is specially designed to protect human rights defenders and guarantees to every person the right, among others (1) "to communicate with non-governmental or intergovernmental organizations"; (2) "to know, seek, obtain, receive and hold information about all human rights and fundamental freedoms"; and (3) "as provided for in human rights and other applicable international instruments, [the right] freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms" (Arts. 5 and 6).

[191] *Declaration of Principles on Freedom of Expression in Africa,* Gambia, 23 October 2002. See Annex.

[192] ACHPR, *Resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa*, 23 October 2002, Preamble.

[193] ACHPR, *Resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa*, 23 October 2002, Preamble.

[194] Constitutional Rights Project, *Civil Liberties Organization and Media Rights Agenda v. Nigeria* (140/94, 141/94, 145/95), 15 November 1999.

magazines of three media houses from circulation for six months with the possibility of extension.[195] According to Communication 141/94, Nigeria "*restrained and restricted the right of Nigerians to receive information and to express and disseminate their opinions*".[196] The complainants alleged violations of Articles 5, 6, 7, 9, 14, and 26 of the African Charter.[197]

"*Freedom of expression is a basic human right, vital to an individual's personal development and political consciousness, and participation in the conduct of public affairs in his country. This right comprises the right to receive information and express opinion*."[198] Therefore, proscribing newspapers is a violation of Article 9(1).[199] According to Article 9 (2) of the Charter, dissemination of opinions may be restricted by law. *"The only legitimate reasons for limitations of the rights and freedoms[…]are found in Article 27(2)[:…]that the rights of the Charter [']shall be exercised with due regard to the rights of others, collective security, morality and common interest[']*",[200] and such limitations must be "*strictly proportionate[…]and absolutely necessary[.]"* Since Nigeria produced no evidence that proscribing publications fell under Article 27(2),[201] its action was disproportionate and unnecessary and therefore a violation of Article 9(2).[202]

8.1 The Scope of Freedom of Expression

The right to freedom of expression, as guaranteed under international law, including the right to seek, receive and impart information and ideas, is **broad** in scope. In terms of imparting information and ideas, it includes the right to express oneself:

* orally,
* in writing, or
* through any means of communication, including electronic means.

Case focus: Sohn v Republic of Korea, HRC 1995[203]
Freedom of imparting information and ideas and criticizing the government
The individual complainant had joined others in issuing a statement supporting a strike and criticising the government, "*exercising his right to impart information and ideas within the meaning of Article 19, paragraph 2*"[204] of the ICCPR.

The complainant was the president of his company's trade union and founding member of a solidarity forum of large company trade unions. A strike was called by members of a company to which the Korean government announced plans to send in police troops to break the strike. In a different city, the author along with other members of the solidarity forum issued a statement supporting the strike and condemning government action. The statement was communicated to the strikers by telefax. The strike ended peacefully. The complainant was convicted under national legislation for intervening in a labour dispute for the purposes of manipulating or influencing the parties concerned.

The State party relied on Article 19(3) and stated that written statements by the author were a disguised invitation for nation-wide strike to all workers. The State party claimed a culture where the idea of proletarian revolt existed in the workers mind. The State party argued that, "*in the case where a national strike would take place……there is considerable reason to believe that the national security and public*

[195] Supra, para 12.
[196] Supra, para 4.
[197] Supra, para 15.
[198] Supra, para 36.
[199] Supra, paras 37-38.
[200] Supra, para 40.
[201] Supra, para 43
[202] Supra, para 44.
[203] *Sohn v. Republic of Korea*. Communication No. 518/1992, U.N. Doc. CCPR/C/54/D/518/1992 (1995). adopted on: 19 July 1995.
[204] At para 10.3.

order of the nation would be threatened."[205] The complainant claimed that the state's view of freedom of expression was too narrow. The State party was found to have breached Article 19(2).

The Committee observed that any restriction of the freedom of expression pursuant to Article 19(3), "*…must cumulatively meet the following conditions: it must be provided for by law, it must address one of the aims enumerated in paragraph 3(a) and (b) of Article19, and must be necessary to achieve the legitimate purpose.*"[206]

In considering whether the measures taken against the author were necessary the Committee concluded that the party had, *"…failed to specify the precise nature of the threat which it contends that the author's exercise of freedom of expression posed…*"[207] and found that none of the arguments advanced by the party sufficed to render the restriction of the author's right to freedom of expression compatible with Article 19(3).

Importantly, the right includes the right to express controversial or unpopular opinions in public; the mere fact that an idea is unpopular cannot justify preventing a person from expressing it.

Case focus: Kivenmaa v Finland, HRC 1994[208]
Freedom to express political opinions and police involvement in restricting freedom of expression
An individual's right "*to express his political opinions, including obviously his opinions on the question of human rights, forms part of the freedom of expression guaranteed by Article19*."[209]

On the visit of a foreign head of state, the author and members of her organisation, gathered across the Presidential Palace, distributed leaflets and raised a banner critical of the human rights record of the visiting head of state. The police immediately took down the banner and questioned the claimant. The claimant was charged under national law for holding a "*public meeting*"[210] without prior notification. The claimant argued that the measures taken by the police (taking away the banner immediately after it was erected and questioning the author) dramatically decreased the possibilities for the author to express her opinion effectively. The key issue was whether the police actions amounted to interference with her freedom of expression and whether the State party was able to rely on Article 19(3) or to use Article 21 restrictions on exercise of the right to peaceful assembly. Finland was found to have violated Articles 19 and 21 of the ICCPR.

On the question of freedom of expression the Committee found that in, *"….this particular case, the author of the communication exercised this right by raising a banner.*"[211] The Committee agreed [with Mr. Kurt Herndl dissenting] *"…that Article19 authorizes the restriction by law of freedom of expression in certain circumstances. However, in this specific case, the State party has not referred to a law allowing this freedom to be restricted or established how the restriction applied to Ms. Kivenmaa was necessary to safeguard the rights and national imperatives set forth in Article19(2)(a) and (b) ICCPR.*[212]

Freedom of expression also includes the right to seek and to receive information from others, including the right to obtain and read newspapers, to listen to broadcasts, to surf the Internet, and, of course, to participate in discussions in public and private as a listener.

[205] At para 9.3.
[206] At para 10.4.
[207] Ibid.
[208] *Kivenmaa v Finland*. Communication No. 412/1990, U.N. Doc. CCPR/C/50/D/412/1990 (1994). adopted on: 31 March 1994.
[209] Ibid, para 9.3.
[210] Ibid, para 2.1.
[211] Ibid, para 9.3.
[212] Ibid.

Freedom of expression is not based on citizenship; one has a right to express oneself in a country which is a signatory to the UDHR even if one is not a citizen of that country and, on the other hand, citizens of that country have the right to express themselves and to receive information when they are abroad.

- ☒ The right is also fully guaranteed regardless of a person's level of education, or their race, colour, sex, language, religion, political or other opinion, national or social origin, property, or birth or other status.

Crucially, the right to freedom of expression involves not only negative obligations on the State to not interfere with the flow of information but also **positive** obligations, such as creating an environment in which a free and independent media can function.

During elections, these positive obligations mean that the State is under a duty to ensure that electors are properly informed about how to vote and election issues.

8.2 Freedom of Expression and Zimbabwe's obligations

In addition to the international and regional treaties, freedom of expression is also guaranteed under the Zimbabwean Constitution.

Section 20 Constitution of Zimbabwe[213]

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in the enjoyment of his freedom of expression, that is to say, freedom to hold opinions and to receive and impart ideas and information without interference, and freedom from interference with his correspondence.

(2) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, the economic interests of the State, public morality or public health;

(b) for the purpose of—

(i) protecting the reputations, rights and freedoms of other persons or the private lives of persons concerned in legal proceedings;

(ii) preventing the disclosure of information received in confidence;

(iii) maintaining the authority and independence of the courts or tribunals or the Senate or the House of Assembly;

(iv) regulating the technical administration, technical operation or general efficiency of telephony, telegraphy, posts, wireless broadcasting or television or creating or regulating any monopoly in these fields;

[213] The Constitution of Zimbabwe (As amended to 1 February 2007).

(v) in the case of correspondence, preventing the unlawful dispatch therewith of other matter; or

(c) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(3) No religious denomination and no person or group of persons shall be prevented from establishing and maintaining schools, whether or not that denomination, person or group is in receipt of any subsidy, grant or other form of financial assistance from the State.

(4) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (3) to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, public morality, public health or town and country planning; or

(b) for regulating such schools in the interests of persons receiving instruction therein; except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(5) No person shall be prevented from sending to any school a child of whom that person is parent or guardian by reason only that the school is not a school established or maintained by the State.

(6) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of expression in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

8.3 Other Regional Guarantees

Global recognition of the importance of freedom of expression is reflected in the regional human rights treaties including the ACHR[214] and the ECHR.[215] While neither these instruments nor judgments of the courts and tribunals operating under them are directly binding on Zimbabwe, they are important comparative and persuasive evidence of the content and application of the right to freedom of expression and may be used to inform the interpretation of Article 19 ICCPR, Article 9 ACHPR, both of which are binding on Zimbabwe and Article 20 of the Constitution.

The ACmHPR has confirmed that its interpretation of the ACHPR *"shall draw inspiration from international law on human and peoples' rights"* as per Article 60 of the ACHPR. The ACmHPR went on, therefore, to comment that, in line with Article 6 of the UN Declaration on Human Rights

[214] Adopted 22 November 1969, came into force 18 July 1978.
[215] ETS Series No. 5, adopted 4 November 1950, came into force 3 September 1953.

Defenders, where speech is *"directed towards the promotion and protection of human rights, 'it is of special value to society and deserving of special protection'*.[216]

8.4 The Authority of Freedom of Expression During Elections

In a functioning democracy, the appointment of a government of choice by voting for the preferred candidate at periodic elections relies on the provision of information to the electorate. Information concerning the various candidates, their policies, and key issues being debated during the election needs to conform to standards of accuracy if the electorate are to make a free choice as to whom they select to represent their interests. As the HRC has emphasised:

> *The free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies a free press and other media able to comment on public issues without censorship or restraint and to inform public opinion […]. This implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.*[217]

Case focus: Aduayom v Togo, HRC 1996[218]
Freedom of speech, criticisim of the government, and freedom to participate in political activities
A joint claim was made by three individuals; Mr Aduayom and Mr Diasso were university teachers whilst Mr Dobou was an inspector at the Ministry of Post and Telecommunications. All three were arrested and charged with the criminal offence of *lèse-majesté* (*outrage au Chef de l'Etat dans l'exercice de sa fonction*). Mr Diasso was arrested on the ground that he was in possession of pamphlets criticising the living conditions of foreign students in Togo and suggesting that money "wasted" on political propaganda would be better spent on improving the living conditions in, and equipment of Togolese universities. Mr Dobou, was arrested because he had been found reading a document outlining in draft form the statutes of a new political party. The cases against all three men were later dropped or considered unfounded. All were released but despite trying were not re-instated to their former posts.

The HRC observed that: *The freedoms of information and of expression are cornerstones in any free and democratic society. It is in the essence of such societies that its citizens must be allowed to inform themselves about alternatives to the political system/parties in power, and that they may criticize or openly and publicly evaluate their Governments without fear of interference or punishment, within the limits set by Article19, paragraph 3.*[219]

The Committee held in that case that the treatment of the complainants appeared to be because of their activities and as there was no indication these represented a threat to the rights and the reputation of others, or to national security or public order, there had been a violation of ICCPR of the ICCPR.

Insofar as the right to freedom of opinion is concerned, the guarantee in Article 19(1) is absolute and cannot be restricted in any manner.[220] It is axiomatic that the freedom to hold a political opinion is imperative in the context of elections, since without it the free will of the population cannot be expressed or discovered.

The guarantee of freedom of expression also applies with particular force in the context of political processes and media reporting on matters of common public interest. The ACPHR, for example, has stressed that "*the key role of the media and other means of communication in ensuring full respect*

[216] 228/99: Law Offices of Ghazi Suleiman/Sudan.
[217] HRC General Comment 25, issued 12 July 1996; *Gauthier v. Canada*, 7 April 1999, Communication No. 633/1995.
[218] *Aduayom, Diasso and Dobou v. Togo*. Communications Nos. 422/1990, 423/1990 and 424/1990, U.N. Doc. CCPR/C/51/D/422/1990, 423/1990 and 424/1990 (1996). Adopted on: 12 July 1996.
[219] At para7.4.
[220] UNCHR and UNITAR, *Manual on Human Rights Reporting under Six Major International Human Rights Instruments* (Sales No. E.91.XIV.1), p. 109, commentary on Article 19 of the ICCPR.

for freedom of expression, in promoting the free flow of information and ideas, in assisting people to make informed decisions and in facilitating and strengthening democracy."[221]

The European Court of Human Rights ("ECtHR") has similarly emphasised that the "*pre-eminent role of the press in a State governed by the rule of law*".[222] It has further stated:

> *Freedom of the press affords the public one of the best means of discovering and forming an opinion of the ideas and attitudes of their political leaders. In particular, it gives politicians the opportunity to reflect and comment on the preoccupations of public opinion; it thus enables everyone to participate in the free political debate which is at the very core of the concept of a democratic society.*[223]

Thus, the provision of such information in the campaign stage of the electoral process involves rights and duties for three groups:

* the political parties and candidates competing for elected positions,
* the news media, and
* the electorate.

Indeed, freedom of expression is intrinsically linked to the freedom of association, especially in election times, as these freedoms work together to provide opportunities for the circulation of ideas. As such, these freedoms must be *"[s]afeguard[ed] as the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression and campaigning as well as access to the media on the part of all stakeholders, during electoral processes as provided for under 2.1.5 above."*[224] At the national level, relevant codes of conduct and laws ought to uphold these ideals and freedoms, as *"[t]he sanctity of the freedom of association and expression should be protected and strictly adhered to. Relevant electoral laws and codes of conduct should provide for this sanctity."*[225]

8.5 Political Parties

The right to freedom of expression enables all political parties to convey their messages to the public through any media of their choosing. The ability of political parties to communicate with potential voters is paramount for the proper functioning of a democracy.

Voters first want to know what a party or candidate stands for before they vote for them. Voting choice is illusory in the absence of adequate information concerning the parties and candidates.

If there is an imbalance in the capacity of parties to communicate, some parties may dominate the process unfairly. Whilst differences in financial backing inevitably lead to some parties being better equipped to campaign, under the ICCPR the State is under an obligation to ensure that all parties have at least some access to means of communicating with the public.

Practical Considerations

Any obstacles other than the natural disadvantages that flow from being a small party should be removed. For example, a minimum number of members should not be a required criteria for parties to fulfil before they van distribute leaflet or hold public meetings.

☒ The State must take positive steps to ensure that these parties have access to the means of mass communication. Typically, a publicly owned or funded broadcaster is under an obligation to provide a measure of free airtime to all competing parties.

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[221] ACHPR, *Resolution on the adoption of the Declaration of Principles on Freedom of Expression in Africa*, 23rd October 2002, preamble.
[222] *Thorgeirson v. Iceland*, 25 June 1992, Application No. 13778/88, para 63.
[223] *Castells v. Spain*, 24 April 1992, Application No. 11798/85, para 43.
[224] SADC, *Principles and Guidelines Governing Democratic Elections*, para 7.4.
[225] SADC PF, *Norms and Standards for Elections in the SADC Region*, para 3(i).

As a means of participating in the democratic process, *"[f]reedom of expression and information, including the right to seek, receive and impart information and ideas, either orally or in writing, or in print, in the form of art, or though any other form of communication, including across frontiers, is a fundamental and an indispensable component of democracy."*[226] As before, the sanctity of the freedoms of expression and association should be adhered to, and this should be reflected by relevant electoral laws or codes of conduct.[227]

8.6 The News Media

The media's critical role in disseminating information concerning candidates, campaigns, and the electoral process requires careful consideration in the context of an election.

The media includes **both public and private outlets**, a distinction that is particularly pertinent in the context of freedom of expression. This is because the right entails obligations on the State to respect the media's own right of free expression, and an obligation on the State to regulate the media so that all candidates have an opportunity to express their opinions to the electorate. While privately-held or "private" media should not necessarily be held to the same standards as public media, there is recognition that the private media may nonetheless be subject to some restrictions.[228] These include ensuring media outlets are fair and balanced in their coverage and providing equal opportunity for access for all candidates.[229, 230]

During the electoral process, there should be sufficient media space to allow for open questioning and debate between political leaders and candidates.[231] The legal framework may require the media to provide voter education and debates between candidates.[232] Moreover, the media should not be refrained from expressing criticisms of the government.[233] A silent period may be instituted immediately in advance of polling day, allowing voters to exercise their franchise freely and without undue pressure. Government officials should not abuse their legal resources or custody over public finance to exert control over media content.[234]

Different types of media outlets including new communication technologies ought to respect these freedoms and to uphold the highest standards.

> *These standards should also apply to new communications technologies such as the Internet, which are of enormous value in promoting the right to freedom of expression and the free flow of information and ideas, particularly across frontiers and at the global level. Any restrictions on these new communications technologies should not: limit or restrict the free flow of information and ideas protected by the right to freedom of expression.*[235]

Journalists are particularly vulnerable to pressure to report in certain ways. In order to assist them in the task of reporting as objectively and honestly as possible, journalists enjoy rights protected under the ICCPR. In particular, journalists have a right freely to seek, receive, and impart information in any

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[226] AU, *Declaration on Principles on Freedom of Expression in Africa*, Art. 1.1.
[227] SADC PF, *Norms and Standards for Elections in the SADC Region*, para 3(i).
[228] Carver (ACE Project), ACE: The Electoral Knowledge Network, Different Obligations of Public and Private Media, Retrieved April 29, 2008 from Ace: The Electoral Knowledge Network.
[229] CoE Committee of Ministers, Recommendation (99) 15 on media coverage of election campaigns, para. 3.1.
[230] International IDEA, International IDEA international Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections, p. 61.
[231] UN, OHCHR, *The Right to Freedom of Expression and Opinion*, para 4p.
[232] NDI, *Promoting Legal Frameworks for Democratic Elections*, p. 47.
[233] UN, OHCHR, *The Right to Freedom of Expression and Opinion*, para 4p.
[234] International IDEA, International IDEA International Electoral Standards: Guidelines for Reviewing the Legal Framework of Elections, p. 56. See also, AU, *Declaration on Principles on Freedom of Expression in Africa*, Art. 14.2: "*States shall not use their power over the placement of public advertising as a means to interfere with media content.*"
[235] Article 19, Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (2001), p. 2.

way they see fit without interference from the government, subject only to legitimate restrictions such as appropriate defamation laws. As such, the authorities may not harass, intimidate, or otherwise obstruct journalists in their work, or impose censorship, or conversely offer rewards for reporting in a certain way. Journalists may not be limited through the imposition of prior censorship, restrictions on who may practice journalism, the abuse of resources or influence by government officials, or political or economic interference into editorial independence.[236]

In the United Nations, Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression (1997), Art. 17(b) states:

> *With these broad principles in mind, the Special Rapporteur wishes to emphasize that in pre-election periods [...] Censorship of any election programme is not allowed and the media are encouraged to broadcast and/or publish election-related programmes and are not penalized for programmes critical of the government, its policies or the ruling party.*[237]

It is crucial that the media should be able to express criticisms of the Government and be permitted to cover all political parties, including those most hostile to the government and they should not suffer any adverse consequences for publishing material which places the government in a negative light.[238] Indeed, everyone has a right to receive information, and this freedom is essential to a democracy in a time of elections so that the public can make informed choices when casting their votes.

In order to ensure the full enjoyment of rights protected by Article 25, the free communication of information and ideas about public and political issues between citizens, candidates and elected representatives is essential. This implies that a free press and other media be able to comment on public issues without censorship or restraint and to inform public opinion. It requires the full enjoyment and respect for the rights guaranteed in Articles 19, 21, and 22 ICCPR, including freedom to engage in political activity individually or through political parties and other organizations, freedom to debate public affairs, to hold peaceful demonstrations and meetings, to criticize and oppose, to publish political material, to campaign for election and to advertise political ideas.[239]

However, the freedom of expression may be restricted in certain circumstances as are prescribed by law and necessary in a democratic society. This restriction is limited by Article 2 of the AU **Declaration on Principles on Freedom of Expression in Africa** which provides that,

> *"1. No one shall be subject to arbitrary interference with his or her freedom of expression. 2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society".*[240]

Moreover, the basis for restrictions may be national security,[241] territorial integrity,[242] and public safety.[243]

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[236] See "*No one should be subject to prior censorship[.]*" Article 19, *Joint Statement on Racism and the Media by the UN Special Rapporteur on Freedom of Opinion and Expression*, the OSCE Representative on Freedom of the Media, and the OAS Special Rapporteur on Freedom of Expression (2001), p. 2. See also, AU, *Declaration on Principles on Freedom of Expression in Africa*, Art. 10.2: "*The right to express oneself through the media by practicing journalism shall not be subject to undue legal restrictions.*" CoE, Committee of Ministers, *Declaration on the guarantee of independence of public service broadcasting*, para Ii.

[237] UN, Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression (1997), Art. 17(b).

[238] CoE Committee of Ministers, *Declaration on Freedom of Political Debate in the Media*, Art. 1

[239] UN, HRC, General Comment 25 on "*The Right to Participate in Public Affairs, Voting Rights and the Right to Equal Access to Public Service*", para 25.

[240] AU *Declaration on Principles on Freedom of Expression in Africa*, Art. 2.

[241] UN, *International Covenant on Civil and Political Rights*, Art. 19(3b).

[242] CoE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 10(2).

Case focus: Sir Dawda K. Jawara v The Gambia, ACHPR, 1995[244]
The intimidation and arresting of journalists, the freedom of expression and dissemination of opinions, and of the public to receive information
The complainant, the former Head of State of the Republic of The Gambia, alleged that the Gambian Military Government ("the Government") had perpetrated "*arrests, detentions, expulsions and intimidation of journalists*", and that the Government did not provide any valid reason.[245] The ACmHPR found that the "*intimidation and arrest or detention of journalists for articles published and questions asked deprives not only the journalists of their rights to freely express and disseminate their opinions, but also the public, of the right to information*" and is clearly a breach of the provisions of Article 9 ACHPR.[246]

Case focus: Article 19 v Eritrea, ACHPR 2003[247]
The freedom of expression, disseminating opinions, freedom of the press, and detention of journalists
From September 2011 to the time the complaint was submitted, Eritrea detained eleven political dissidents and eighteen journalists, incommunicado and without trial.[248] Private newspapers were also banned and yet Eritrea maintains that the ban was temporary.[249] The parties disagreed about the motivation behind detaining the individuals and banning the press.[250] Eritrea claimed that it "*occurred because, 'the stated newspapers and the leading editors were recruited into the illegal network organised for the purpose of ousting the Government through illegal and unconstitutional means'*",[251] which the ACmHRP interpreted as Eritrea viewing its actions as justified by the circumstances and permissible under Eritrean law, regarding Articles 7 and 9, which respectively state: *"No-one may be deprived of his freedom [except for reasons and conditions previously laid down by law]; and [e]very individual shall have the right to express and disseminate his opinions [within the law]*."[252]

Claw back clauses would allow States Parties "*to negate the rights conferred upon individuals [.]*"[253] However, *"[a]ny law enacted by the Eritrean Government which permits a wholesale ban on the press and the imprisonment of those whose views contradict those of the Government's is contrary to both the spirit and the purpose of Article 9*", and any limitation on rights must be in conformity with the Charter.[254] Both the right of those imprisoned to express and disseminate their opinions and the right of the press to receive information have been breached under Article 9, which is intended to proscribe the banning of the entire private press because it might threaten an incumbent government.[255] The ACmHPR emphasised that *"a free press is one of the tenets of a democratic society, and a valuable check on potential excesses by government"*.[...] *No political situation justifies the wholesale violation of human rights; indeed general restrictions on rights such as the right to free expression and to freedom from arbitrary arrest and detention serve only to undermine public confidence in the rule of law and will often increase, rather than prevent, agitation within a state*."[256]

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[243] Article 19, 'Guidelines for Election Broadcasting in Transitional Democracies', *Article 19: The Global Campaign for Free Expression*, p. 60, *"[G]overnments may prevent the dissemination of election broadcasts only where such dissemination would be certain to lead to a disruption of public order or a violation of some other interest that the government is legitimately entitled to protect. A strong argument can be made that government-controlled media, especially where they control the only or main channels in a region, may not refuse to broadcast political debate save in limited circumstances."*
[244] 147/95-149/96: Sir Dawda K. Jawara/Gambia (The).
[245] Supra, paras 6 and 65.
[246] Supra, para 65.
[247] 275/03 Article19/Eritrea.
[248] Supra, para 88.
[249] Supra, para 88.
[250] Supra, para 89.
[251] Supra, para 89.
[252] Supra, para 90.
[253] Supra, para 91.
[254] Supra, para 104.
[255] Supra, para 106.
[256] Supra, para 106.

While the media's right to free expression must be respected, State practices in European jurisdictions have demonstrated that reasonable limitations may be imposed to ensure the fulfilment of other rights: the media may be required to provide voter education and to air debates between candidates;[257] limits on advertising spending may be instituted to ensure equality of opportunity;[258] and a silent period may be instituted immediately in advance of polling day, allowing voters to exercise their franchise freely and without undue pressure.[259]

The HRC has interpreted international provisions guaranteeing freedom of expression to provide that the publication of opinion polls may be restricted until polling is complete.

Case focus: Kim Jong-Choel v Republic of Korea, HRC 2005[260]
Freedom of expression and dissemination of ideas during an election, freedom of the public to receive information
The claimant was journalist. On 11th December 1997 he published an article in a weekly national publication on opinion polls between 31st July and 11th December 1997 for the Presidential election on 18th December 1997. He was charged for violating national laws which prohibited publication of opinion polls during the electoral campaign period which was 23 days running up to and including the election day. The complainant argued that under Article19, his duty to report is a prerequisite to the public right to access information and that the ban in question was an excessive and disproportionate restriction. The State party claimed Article 19(3) defence in that a fair election is an integral part of public order in a democratic society. The key issue was whether the author's conviction violated Article 19(2). The Committee concluded that there was no violation.

The UN Human Rights Committee interpreted Article 19 to provide that the publication of opinion polls may be restricted until polling is complete noting that:
…the underlying reasoning for such a restriction is based on the wish to provide the electorate with a limited period of reflection, during which they are insulated from considerations extraneous to the issues under contest in the elections, and that similar restrictions can be found in many jurisdictions.[261]

The Committee commented that the cut-off date of 23 days prior to the election stipulated in the domestic law of the State party in that case was "*unusually long*", but no specific finding was made on this as the act of publishing previously unreported opinion polls had taken place within seven days of the election.

Case focus: Constitutional Rights Projects, Civil Liberties Organisation and Media Rights Agenda v Nigeria, ACHPR 1999 (ctd.)[262]
Registration of news media, restrictions on the news media, the freedom of expression and dissemination of information, and the freedom of the public to receive information
In this compliant the Nigerian Government had promulgated a Decree extinguishing the registration of existing newspapers under a previously subsisting law. This was to create an offence punishable by a fine and/or imprisonment for a person to own, publish or print a newspaper not registered under that Decree, and vesting exclusive power in the Newspapers Registration Board set up under the Decree to decide whether or not to register a newspaper, regarding which it had total discretion on the basis of whether it was "*justified having regard to the public interest*". There were no procedures for challenging the Board's decision not to register a newspaper and large sums were required as payment for the registration fee and as a deposit for pre-registration to meet the amount of any penalty imposed on or damages awarded against the owner, printer, or publisher of the newspaper by a court of law in the future.

[257] EU, *Handbook on EU Election Observation*, (2nd Ed.), p. 54.
[258] Venice Commission, Code of Good Practice, sec. I.2.3.ee.
[259] CoE Committee of Ministers, Recommendation (99)15 on *Measures Concerning Media Coverage during Election Campaigns*, para 3.1.
[260] *Kim Jong-Choel v. Republic of Korea*. Communication No. 968/2001, U.N. Doc. CCPR/C/84/D/968/2001 (2005).
[261] *ibid* para 8.3.
[262] *Constitutional Rights Projects, Civil Liberties Organisation and Media Rights Agenda v Nigeria*, ACHPR 1999

The ACmHPR commented that the amount of the registration fee should be no more than necessary to ensure administrative expenses of the registration, pre-registration fees should not exceed the amount necessary to secure against penalties or damages against the owner, printer or publisher of the newspaper and excessively high fees "*are essentially a restriction on the publication of news media*". The Commission held in that case that there had been a violation of Article 9.1, as, **"***the total discretion and finality of the decision of the registration board, which effectively gives the government the power to prohibit publication of any newspapers or magazines they choose…invites censorship and seriously endangers the rights of the public to receive information, protected by Article 9.1*."

The ACmHPR's further elaborations of the principles underpinning the right to freedom of expression and information in the specific context of the news media are worth quoting at length. The ACmHPR emphasised, "*No situation justifies the wholesale violation of human rights. In fact, general restrictions on rights diminish public confidence in the rule of law and are often counter-productive….International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter…The reasons for possible limitations must be founded in a legitimate State interest and the evils of limitations of rights must be strictly proportionate with and absolutely necessary for the advantages which are to be obtained…. The government has provided no evidence that the prohibition was for any of the above reasons given in Article 27.2. Given that Nigerian law contains all the traditional provisions for libel suits, so that individuals may defend themselves where the need arises, for the government to proscribe a particular publication, by name, is disproportionate and uncalled for. Laws made to apply specifically to one individual or legal personality raise the serious danger of discrimination and lack of equal treatment before the law, guaranteed by Article 3.*

The proscription of The News cannot therefore be said to be "within the law" and constitutes a violation of Article 9.2… In the present case, the government has provided no evidence that seizure of the magazine was for any other reason than simple criticism of the government… All of the legislation criticized in the Article was already known to members of the public information, as laws must be, in order to be effective. The only person whose reputation was perhaps tarnished by the Article was the head of state. However, in the lack of evidence to the contrary, it should be assumed that criticism of the government does not constitute an attack on the personal reputation of the head of state. People who assume highly visible public roles must necessarily face a higher degree of criticism than private citizens; otherwise public debate may be stifled altogether. It is important for the conduct of public affairs that opinions critical of the government be judged according to whether they represent a real danger to national security. If the government thought that this particular Article represented merely an insult towards it or the head of state, a libel action would have been more appropriate than the seizure of the whole edition of the magazine before publication. The seizure of the TELL therefore amounts to a violation of Article 9.2."

8.7 Defamation

Article 12 of the AU's Principles on Freedom of Expression in Africa clearly establishes that the expression of an opinion or of a true statement may never constitute a valid claim of defamation and that claims of defamation by political figures and public officials should be subject to greater public scrutiny and criticism than those made by other citizens.

Article 12, AU, Declaration on Principles on Freedom of Expression in Africa
States should ensure that their laws relating to defamation conform to the following standards: No one shall be found liable for true statements, opinions or statements regarding public figures which it was reasonable to make in the circumstances; public figures shall be required to tolerate a greater degree of criticism; and sanctions shall never be so severe as to inhibit the right to freedom of expression, including by others.

According to the UN Special Rapporteur on Freedom of Expression, defamation laws should only be used to protect individuals and never to prevent criticism of the government or institutions.[263] A range of remedies should be available in cases of defamation, which should represent proportional responses.[264]

Case focus: John D. Ouko v Kenya, ACHPR 1999[265]

Freedom of expression and safety of doing so, being forced to flee because of expressing political opinions

The ACmHPR stated that the facts show that the complainant was no longer in Kenya; that he had been forced to flee the country due to his political opinions and Student Union activities; and that he was recognised as a refugee under the UNHCR mandate.[266] Uncontested by Kenya,[267] the complainant alleged "*that prior to his fleeing the country, he was arrested and detained for [ten] months without trial in the notorious basement cells of the Secret Service Department headquarters in Nairobi*."[268] The ACmHPR made clear as regards the proviso that Article 9 of the Charter guarantees to every individual the right to free expression within the confines of the law,[269] that "*[i]mplicit in this is that if such opinions are contrary to laid down laws, the affected individual or government has the right to seek redress in a court of law. Herein lies the essence of the law of defamation*."[270] The Commission found, in that case, that such procedure had not been followed, Kenya instead having opted to arrest and detain the Complainant without trial and subject him to a series of inhuman and degrading treatments, which was therefore found to be in violation of Article 9 of the Charter.

Case focus: Kankanamge v Sri Lanka, HRC 2004[271]

Defamation, the freedom of the press and of expression of opinions, and equality and equal protection of the law

The complainant was a journalist and editor of a newspaper. Since 1993 he had been indicted several times for allegedly having defamed ministers and high level officials, in articles and reports in his newspaper. The author claimed that the indictments were indiscriminately and arbitrarily transmitted by the Attorney-General directly to the High Court in order to harass him. He claimed he had been intimidated, his freedom of speech restricted and the publication of his newspaper obstructed. The author alleged violation of Article 19 (freedom of expression) and 26 (equality and equal protection of the law). Further, he claimed violation of Article 2(3) since the national Supreme Court refused to grant him leave to proceed with the application to suspend the indictments and thereby deprived him of an effective remedy.

The HRC held that the State party was in violation of Articles 14(3) (proceedings were unreasonably prolonged) and Article 19 (read together with Article 2(3)). In considering the articles in which the claimant allegedly defamed high State party officials, these were, "*directly attributable to the exercise of his profession of journalist and, therefore, to the exercise of his right to freedom of expression.*"[272] The

[263] UN, *Report of the Special Rapporteur on Freedom of Expression 1999*, Article 28(a). "The only legitimate purpose of defamation, libel, slander and insult laws is to protect reputations; this implies defamation will apply only to individuals -- not flags, States, groups, etc.; these laws should never be used to prevent criticism of government or even for such reasons as maintaining public order for which specific incitement laws exist."

[264] CoE Committee of Ministers, *Declaration on Freedom of Political Debate in the Media*, Article 8. See United Nations, *Report of the Special Rapporteur on the Protection and Promotion of the Right to Freedom of Opinion and Expression (1997)*, Art. 28(g-h): "In defamation and libel actions, a range of remedies should be available, including apology and/or correction; and (h) Sanctions for defamation should not be so large as to exert a chilling effect on freedom of opinion and expression and the right to seek, receive and impart information; penal sanctions, in particular imprisonment, should never be applied."

[265] 232/99: John D. Ouko/Kenya.

[266] *Supra*, para 18.

[267] *Supra*, para 21.

[268] *Supra*, para 20.

[269] *Supra*, para 27.

[270] *Supra*, para 28.

[271] *Kankanamge v Sri Lanka*. Communication No. 909/2000, U.N. Doc. CCPR/C/81/D/909/2000 (2004).

[272] At para 9.4.

Committee emphasised that to have kept the indictments pending for several years after the entry into force of the Optional Protocol for the State party "*left the author in a situation of uncertainty and intimidation… and thus had a chilling effect which unduly restricted the author's exercise of his right to freedom of expression*."[273]

Case focus: Marques v Angola, HRC 2005 [274]
Freedom of expression and the right to evaluate and/or openly and publicly criticise Government without fear of interference or punishment
The HRC considered a complaint where the individual complainant, a journalist and the representative of the Open Society Institute in Angola, had written several articles critical of the Angolan President, stating that the President was responsible "*for the destruction of the country and the calamitous situation of State institutions*" and was "*accountable for the promotion of incompetence, embezzlement and corruption as political and social values*."[275] The complainant, having reiterated these criticisms on radio and described the intensive questioning to which he was subjected by the authorities following publication of the articles, was later charged with defamation and slander against the President and subject to restrictions by the terms of his bail.

The Committee reiterated that "*the right to freedom of expression in Article 19, paragraph 2 includes the right of individuals to criticize or openly and publicly evaluate their Governments without fear of interference or punishment.*"[276] The Committee held that, *"Even if it were assumed that his arrest and detention, or the restrictions on his travel, had a basis in Angolan law, and that these measures, as well as his conviction, pursued a legitimate aim, such as protecting the President's rights and reputation or public order it cannot be said that the restrictions were necessary to achieve one of these aims. The Committee observes that the requirement of necessity implies an element of proportionality, in the sense that the scope of the restriction imposed on freedom of expression must be proportional to the value which the restriction serves to protect. Given the paramount importance, in a democratic society, of the right to freedom of expression and of a free and uncensored press or other media, the severity of the sanctions imposed on the author cannot be considered as a proportionate measure to protect public order or the honour and the reputation of the President, a public figure who, as such, is subject to criticism and opposition*.[277]

8.8 The Voters' Right to Freedom of Information

The combination of the ICCPR rights to receive information and to participate in public affairs means that the general public has the right to receive complete and unbiased information about the contending parties.

The State has the main responsibility to ensure that this right is respected, it has an obligation to create an environment within which the media – who are the primary source of information – are able to freely go about their job of informing the public. Publicly-owned or funded media also have an important role to play in informing the public and are under an obligation to do so without political bias. The media are also under a professional obligation to inform the public fully and truthfully about all matters relevant to the elections. This leaves journalists with the occasionally difficult task of reporting on all the parties in a neutral way, however laudable or repugnant a particular candidate may seem to the journalist in question. However, in a democracy, the power belongs to the whole population, not just the educated or informed elite. It is imperative that

[273] Ibid.
[274] *Marques v Angola*. Communication No. 1128/2002, U.N. Doc. CPR/C/83/D/1128/2002 (2005). Adopted on: 29 March 2005.
[275] At para 2.1.
[276] At para 6.7.
[277] At para 6.8.

journalists do not substitute their own judgment for that of the electorate by reporting more extensively and favourably on one party than another.

8.9 Restrictions to freedom of expression

While the right to freedom of expression and is not absolute. However international human rights law prevents governments from arbitrarily restricting these rights.

In respect of rights contained in the ICCPR, the HRC has stated that,

> *States Parties must refrain from violation of the rights recognised by the Covenant and any restrictions on any of those rights must be permissible under the relevant provisions of the Covenant. Where such restrictions are made, States must demonstrate their necessity and only take such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights. In no case may the restrictions be applied or invoked in a manner that would impair the essence of a Covenant right.*[278]

Principle II, ACmHPR's Declaration of Principles on Freedom of Expression in Africa[279]

1. No one shall be subject to arbitrary interference with his or her freedom of expression.

2. Any restrictions on freedom of expression shall be provided by law, serve a legitimate interest and be necessary and in a democratic society.

Both formulas have been interpreted as requiring restrictions to meet a strict three-part test:

The interference must be in accordance with a law or regulation;

The legally sanctioned restriction must protect or promote an aim deemed legitimate in international law; and

The restriction must be necessary for the protection or promotion of the legitimate aim.[280]

8.9.1 Interference in accordance with the law

The first condition means that the interference cannot be merely the result of the whim of an official. The interference must be based on an enacted law or regulation. However, not all 'laws' or 'regulations' meet the standard of 'provided by law'. The law must meet certain standards of clarity, precision, and specificity so that it is clear in advance exactly what expressions are prohibited.[281] Vaguely worded edicts with potentially very broad application will not meet this standard and are thus illegitimate restrictions on freedom of expression.

Case focus: Kim v Republic of Korea, HRC 1994[282]
Freedom of expression and dissemination of information, freedom to evaluate the Government without interference or punishment, and freedom of the public to receive information
The author was convicted under the 'National Security Law' for expressing opinions sympathetic to an 'anti-State organization' ("North Korea").[283] The author was a founding member of the National Coalition

[278] General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add.1, para 6.
[279] ACHPR, *Declaration of Principles on Freedom of Expression in Africa*, I(1), October 2002, Gambia.
[280] See, for example, *Mukong v. Cameroon*.. Communication No. 458/1991 (21 July 1994), para 9.7 (HRC).
[281] *The Sunday Times v. United Kingdom*, 26 April 1979, Application No. 6538/74, para 49 (ECtHR).
[282] *Kim v. Republic of Korea*, Communication No. 574/1994, U.N. Doc. CCPR/C/64/D/574/1994 (4 January 1999). Adopted on: 3 November 1998.
[283] At para 2.4.

for Democratic Movement ("NCDM"). He was the Chief of the Policy Planning Committee and Chairman of the Executive Committee of that organisation. He prepared documents which criticised the government of the Republic of Korea and its foreign allies, and appealed for national reunification. At an inaugural meeting of the NCDM, these documents were distributed and read out to approximately 4,000 participants; the author was arrested at the conclusion of the meeting. He was found guilty under the Article 7 National Security Law.[284] The author alleged that the provision, was used to punish anyone criticising the State on the basis that the criticism was similar to that proliferated by North Korea against South Korea. The author claimed he was a model of such an abusive application of the National Security Law.

The Committee noted that the national court held that the mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt and emphasised the need for careful scrutiny on its part as the alleged offence committed by the complainant was formulated in "*broad and unspecific terms*" under the relevant domestic legislation[285]. The State party was held to be in breach of Article 19 (2) of the Covenant.

Case focus: Amnesty International and Others v Sudan, ACHPR 1999[286]
Freedom to express and disseminate opinions and unlawful blanket restrictions on the freedom of expression
Submitted by Amnesty International and the Association of Members of the Episcopal Conference of East Africa".[287] The ACmHPR held that there had been "*restrictions on freedom of expression in the national press*". When considering a domestic law which stipulates that during a state of emergency, any form of political opposition, by any means, to the regime is prohibited, it noted that "*the Charter contains no derogation clause, which can be seen as an expression of the principle that the restriction of human rights is not a solution to national difficulties: the legitimate exercise of human rights does not pose dangers to a democratic State governed by the rule of law.*"[288] The ACmHPR noted that "*any restrictions on rights should be the exception"* and held that the State party's imposition of a blanket restriction on the freedom of expression constituted a violation of the spirit of Article 9.2.[289]

8.9.2 Legally sanctioned restrictions in accordance with international law

The second condition, that a restriction must serve a legitimate aim, is not open-ended. The list of legitimate aims provided in Article 19(3) of the ICCPR is exclusive and governments may not add to these. This includes only the following legitimate aims: respect for the rights and reputations of others, and protection of national security, public order (*ordre public*), public health or morals.[290]

Where a State seeks to limit the right on the grounds of protection of public morals, a certain margin of discretion is afforded, on the basis that, "*[...] public morals differ widely. There is no universally applicable common standard.*"[291] This justification for limiting free expression is least likely to be invoked in the context of elections since peaceful political participation is unlikely to jeopardise public morals.

[284] At para 2.3.
[285] At para 12.3.
[286] 48/90-50/91-52/91-89/93: Amnesty International, Comité Loosli Bachelard, Lawyers' Committee for Human Rights, Association of Members of the Episcopal Conference of East Africa/Sudan.
[287] Supra, para 20.
[288] Supra, para 79.
[289] Supra, para 80.
[290] UN, ICCPR, Art. 19(3a).
[291] *Leo Hertzberg et al. v. Finland*, Communication No. 61/1979, U.N. Doc. CCPR/C/OP/1 at 124 (1985).

Case focus: Muteba v Zaire, HRC 1984[292]

Freedom of expression and criticism of Government without fear of punishment or interference, freedom to disseminate ideas

The complainant had been charged in a prison register with attempts against the internal and external security of the State and with the foundation of a secret political party but had never been brought before a judge nor brought to trial. The HRC held there had been a violation of Article 19 ICCPR. The Committee considered the author's arrest, detainment and ill-treatment to have been for political reasons, he was considered to be an opponent of the government of Zaire. The claimant alleged violations of Articles 9, 10, 14, 16 and 19 ICCPR. Despite repeated requests from the HRC, the State party failed to furnish any information or clarifications of the allegations.

In formulating its views, the HRC took this failure into account and stated that in, *"… the circumstances, due weight must be given to the authors' allegation…In no circumstances should a State party fail to duly investigate and to properly inform the Committee of its investigation of allegations…"*[293] The HRC concluded that there had been breaches of:

- Articles 7 and 10(1), *because Mr. Tshitenge Muteba was subjected to torture and not treated in prison with humanity and with respect for the inherent dignity of the human person, in particular because he was held incommunicado for several months;*
- Article 9(9), *because, in spite of the charges brought against him, he was not promptly brought before a judge and had no trial within a reasonable time;*
- Article 9(4), *because he was held incommunicado and effectively barred from challenging his arrest and detention;*
- Article 14(3) (b) (c) and (d), *because he did not have access to legal counsel and was not tried without undue delay;*
- Article 19, *because he suffered persecution for his political opinions.*[294]

Case focus: Jaona v Madagascar, HRC 1985[295]

Freedom of expression and opinion, freedom to evaluate/criticise Government without interference or punishment

The HRC considered a communication where the complainant was arrested on the pretext that demonstrations organised in his support were endangering public order and security. The complainant was the presidential candidate for the opposition party who, upon the re-election of the incumbent president, had challenged the results and called for new elections at a press conference and was subsequently placed under house arrest, detained at a military camp and not informed of the grounds for his arrest. There was no indication that charges were ever brought against him or investigated. The HRC took into account the failure of the State to furnish the requested information and clarifications. The HRC was of the view, *inter alia*, that there had been violations of the ICCPR of:

- Article 9(1), *because Monja Jaona was arrested in December 1982 and detained until August 1983 on account of his political opinions;*
- Article 9(2), *because he was not informed of the reasons for his arrest or of any charges against him;*
- Article 19(2), *because he suffered persecution on account of his political opinions.*[296]

[292] *Muteba v. Zaire*. Communication No. 124/1982 (25 March 1983), U.N. Doc. Supp. No. 40 (A/39/40) at 182 (1984). Adopted on: 24 July 1984.
[293] At para 11.
[294] At para 12.
[295] *Monja Jaona v. Madagascar*. Communication No. 132/1982, U.N. Doc. Supp. No. 40 (A/40/40) at 179 (1985). Adopted on: 1 April 1985.
[296] At para 14.

Case focus: Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, ACHPR 1999 (ctd.)[297]

Freedom of expression and opinion and to disseminate opinions, unlawful and illegitimate reasons for restrictions on freedoms

The ACmHPR made it clear that although dissemination of opinions may be restricted by law under Article 9(2) of the Charter, "[*a]ccording to Article 9(2), dissemination of opinions may be restricted by law, This does not however mean that national law can set aside the right to express and disseminate one's opinions guaranteed at the international level[.]*"[298] The ACmHPR further stated that the ACHPR does not contain a derogation clause. Therefore limitations on the rights and freedoms enshrined cannot be justified by emergencies or special circumstances. "*The only legitimate reasons for limitations […] are found in Article 27(2) [and…] ['']shall be exercised with due regard to the rights of others, collective security, morality and common interest['']*". The requirements for this are that the limitations be strictly proportionate and absolutely necessary and must not render rights illusory;[299]

Nigeria produced no substantive evidence that these criteria had been met and there was therefore a violation of Article 9(2).[300]

8.9.3 Restriction for the protection or promotion of the legitimate aim

Finally, even if a restriction is in accordance with an acceptably clear law and in the service of a legitimate aim, it will breach the right to freedom of expression unless it is necessary for the protection of that legitimate aim. This has a number of implications.

If another measure which is less intrusive to a person's right to free expression would accomplish the same goal, the restriction is not in fact necessary. For example, shutting down a newspaper for defamation is excessive where a retraction or a combination of measures such as a retraction, a warning, or a fine would adequately protect the defamed person's reputation.

The restriction must impair the right as little as possible and in particular not restrict legitimate speech. In protecting national security, for example, it is not acceptable to ban all discussion about a country's military forces. In applying this, courts have recognised that there may be practical limits on how fully honed and precise a legal measure can be. Subject only to such practical limits, restrictions must not be overbroad.

The impact of restrictions must be proportionate in the sense that the harm to freedom of expression must not outweigh the benefits in terms of the interest protected. A restriction which provided limited protection to reputation but which seriously undermined freedom of expression would not be proportionate.

Case focus: Park v Republic of Korea, HRC 1995[301]

Freedom of expression and opinion and to criticise/evaluate government without interference or punishment; legal restrictions on these rights

The claimant was found guilty of breaching the national security legislation of his country for being an active member of an American organisation called Young Koreans United (YKU), whilst studying in USA. It was agreed that YKU was highly critical of the Korean regime and of the American support thereof. The national court termed YKU as an *"enemy-benefitting organization"* with the aim of furthering the activities of the North Korean government. The claimant argued that his activities were well within the boundaries of Article 19 ICCPR. The State party claimed a precarious security situation and claimed it was

[297] See supra, note 5.
[298] Supra, para 40.
[299] Supra, para 42.
[300] Supra, para 44.
[301] *Park v. Republic of Korea,*. Communication No. 628/1995, U.N. Doc. CCPR/C/64/D/628/1995 (3 November 1998). Adopted on: 20 October 1998.

necessary to preclude individual rights under ICCPR in favour of the preservation of the democratic fabric of the society. The State party was held to be in violation of Article 19(2).[302]

The Committee made it clear that "*The right to freedom of expression is of paramount importance in any democratic society, and any restrictions to the exercise of this right must meet a strict test of justification*."[303]

Case focus: Huri Laws v Nigeria, ACHPR 2000
Freedom of expression and opinion, the right to free press, and the right of the public to receive information
Huri Laws, a human rights NGO, had experienced harassment and persecution in the form of arrest and detention of key members and staff of the organisation, and by way of raids and searches without warrants in the organisation's offices by the government security agency, the ACmHPR found that such treatment of the NGO is an attempt to undermine its ability to carry out its functions - enlightening the people of their rights – amounted to a violation of Articles 9 and 10 ACHPR providing respectively for the rights to freedom of expression and association.

Case focus: Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria, ACHPR 1999 (ctd.)[304]
Requirement of minimal restriction of rights
The ACmHPR established that "*where it is necessary to restrict rights, the restriction should be as minimal as possible and should not undermine fundamental rights guaranteed under international law.*"

A democratic society depends on the free flow of information and ideas and it is only when the overall public interest is served by limiting that flow that such a limitation can be justified. In addition, the reasons given by the State to justify the restriction must be "relevant and sufficient".[305]

Case focus: Alba Pietraroia Alba Pietraroia v. Uruguay, HRC 1981 [306]
Right to freedom of expression and opinion and to participate in political and trade-union activities; the State's restrictions on those rights
The author was arrested in Uruguay in 1976, without a warrant for arrest and held incommunicado under the *"prompt security measures"* for four to six months. On two occasions he was committed to the military hospital. At trial he was charged by a military court with the offences of *"subversive association"* and *"conspiracy to violate the Constitution, followed by acts preparatory thereto".*[307] In 1978 the author was sentenced to 12 years' imprisonment, in a closed trial, conducted in writing and without his presence. His right to a defence counsel of his own choice was curtailed, and the judgement of the court was not made public. Mr Pietraroia was deprived of the right to engage in political activities for 15 years. The author claimed that he was arrested, charged and convicted on account of his prior political and trade-union activities which had been lawful at the time he was engaged in them. The State party offered no explanation. The HRC held that the State was in violation ICCPR including Article 19 (2).

In such a case where the State relies on the limitations to the right in Article 19, HRC has held that, *"bare information"*[308] from the State party that the complainant was charged with subversive association and conspiracy to violate the Constitution, followed by preparatory acts thereto, was *"not in itself sufficient, without details of the alleged charges and copies of the court proceedings,"* to justify the interference with the complainant's right to engage in political and trade union activities.

[302] At para 2.3.
[303] At para 10.3.
[304] See supra, note 5
[305] *Lingens v. Austria*, 8 July 1986, Application No. 9815/82, paras 39-40 (ECtHR).
[306] *Alba Pietraroia Alba Pietraroia v. Uruguay*, Communication No. 44/1979, U.N. Doc. CCPR/C/OP/1 at 76 (1984). Adopted on: 27 March 1981.
[307] Ibid.
[308] At para 15.

In this case, the HRC noted that *"the Government of Uruguay has offered no explanations as regards the concrete factual basis of the offences for which Rosario Pietraroia was charged in order to refute the claim that he was arrested, charged and convicted on account of his prior political and trade-union activities."*[309]

Case focus: Davidson and McIntyre v Canada, HRC 1993[310]

Freedom of expression and freedom from discrimination and minority rights; language use in a multilingual society

Three English-speaking Quebecers: Ballantyne, Davidson, and McIntyre, who owned businesses in Quebec, challenged sections of Bill No. 178 (amendments to the Charter of the French Language) enacted by the government of Quebec. They alleged to be victims of violations of Articles 2, 19 (freedom of expression), 26 (ban of discrimination) and 27 (minority rights) ICCPR by the Government of Canada and by the Province of Quebec, because they were forbidden to use English in advertising or in the name of their firms. The State party was held to be in violation of Articles 19, 26 and 27 of the Covenant.
The HRC held that a commercial activity such as outdoor advertising fell within the ambit of Article 19, it also made it clear that it was "*not necessary, in order to protect the vulnerable position in Canada of the francophone group, to prohibit commercial advertising in English*".[311] It was relevant that such "*protection may be achieved in other ways that do not preclude the freedom of expression, in a language of their choice, of those engaged in such fields as trade*", e.g. there could be a requirement stipulating that advertising be both in English and French. It was emphasised by the HRC that a State " *may choose one or more official languages, but it may not exclude, outside the spheres of public life, the freedom to express oneself in a language of one's choice*".[312]

Case focus: Mukong v Cameroon, HRC 1991[313]

Freedom of expression and opinion; book banning due to restriction on freedom of expression based on national unity argument

The author was an advocate of multi-party democracy. As a result of his writing he spent years in prison and his books were banned. Cameroon argued that the exercise of the right to freedom of expression must take into account the political context and situation prevailing in the State concerned at any given time. It argued that since the independence and reunification of Cameroon, the State had been in a constant battle to strengthen national unity. The HRC rejected that the individual's opinions which were "*inimical to the State party's government*"[314] and interference was justified under the limitations provided for in Article 19(3).

The HRC considered that "*the legitimate objective of safeguarding and indeed strengthening national unity under difficult political circumstances cannot be achieved by attempting to muzzle advocacy of multi-party democracy, democratic tenets and human rights*."[315]

Case focus: Kim v Republic of Korea, HRC 1994[316]

Freedom of expression, of opinion and to disseminate ideas; reading and distributing printed material coinciding with political views of enemy State; risk to national security and questions of necessity

The complainant was convicted for having read out and distributed printed material regarded as coinciding with the policy statements of the DPRK (North Korea), with which the State party was in a

[309] At para 13.2.
[310] *Davidson and McIntyre v. Canada*,. Communication Nos. 359/1989 and 385/1989, U.N. Doc. CCPR/C/47/D/359/1989 and 385/1989/Rev.1 (1993). Adopted on: 31 March 1993.
[311] At para 11.4.
[312] Ibid.
[313] *Mukong v. Cameroon.* Communication No. 458/1991, U.N. Doc. CCPR/C/51/D/458/1991 (1994). Adopted on: 21 July 1994.
[314] At paras 9.6 and 10.
[315] At para 9.7.
[316] *Kim v. Republic of Korea.* Communication No. 574/1994, U.N. Doc. CCPR/C/64/D/574/1994 (4 January 1999). Adopted on: 3 November 1998.

state of war. His conviction was on the basis that he had done this with the intention of siding with the activities of the DPRK. The claimant argued that mere knowledge that the activity could be of benefit to North Korea was sufficient to establish guilt under national laws. The HRC considered it necessary for there to be clarity as to "*how the (undefined) 'benefit' that might arise for the DPRK from the publication of views similar to their own created a risk to national security*"[317] and as to "*the nature and extent of any such risk*".[318]

The HRC noted specifically that the domestic courts had not addressed these questions nor had they considered "*whether the contents of the speech or the documents had any additional effect upon the audience or readers such as to threaten public security, the protection of which would justify restriction within the terms of the Covenant as being necessary."*[319]

Case focus: Shin v Republic of Korea, HRC 2000[320]
Freedom of expression and opinion and to disseminate ideas; artist publishing and distributing picture and accused of enemy-benefitting expression; national security considerations
The author was a professional artist who painted a picture which was widely distributed. The author was arrested and his picture confiscated since it was deemed to be an *"enemy-benefitting expression"*.[321] He was first acquitted since it was not proven that the art was a threat to national security or to the democratic order of the State. He was however, convicted and sentenced at re-trial. A key basis of the conviction was the opinion of an expert witness who took the view that through the picture, the author was seeking to incite a regime change and hence, promoting the DPRK (North Korea) doctrine. The claimant alleged violation of Article 19(2) and argued that the sentencing court based the judgment against him on a subjective and emotional test, failing to demonstrate a link between the art piece and Article 19(3). The State party was held to be in violation of Article 19(2).
The Human Rights Committee emphasised the need for "*individualized justification*", i.e. for State parties to demonstrate in specific fashion the precise nature of the threat to one of the purposes enumerated in Article 19 paragraph 3 and why measures limiting the right to freedom of expression are necessary.[322]

8.9.4 Other Restrictions

Article 5 ICCPR provides the State with a greater ability to regulate expression when the activity or expression seeks to destroy other rights recognised in the ICCPR.

Article 5 ICCPR

1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognised herein or at their limitation to a greater extent than is provided for in the present Covenant.

An example of reliance on this justification for limiting rights under Article 19 emerged in a Canadian case. In that case, the State relied on Article 20(2) of the ICCPR which provides:

> *Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.*[323]

[317] At para 12.4.
[318] Ibid.
[319] At para 12.4.
[320] *Shin v. Republic of Korea*. Communication No. 926/2000. U.N. Doc. CCPR/C/80/D/926/2000 (2004). Adopted on: 16 March 2004.
[321] At para 2.2.
[322] At para 7.3.

The HRC found that the opinions which the complainant sought to disseminate, *"clearly constitute[d] the advocacy of racial or religious hatred which Canada has an obligation under Article 20(2) of the Covenant to prohibit*."[324]

Where an individual or a political party engages in activities or expression which conflict with rights recognised in the ICCPR, a State may be permitted to regulate such activities or expression. Where an individual was engaged in the re-organisation of the dissolved fascist party, prohibited in Italian penal law under which the individual was convicted, the HRC found that the State's interference with the complainant's right to expression was justified on the basis that the acts of the complainant,

> *"[…] were of a kind removed from the protection of the Covenant by Article 5 thereof and which were in any event justifiably prohibited by Italian law having regard to the limitations and restrictions applicable to the rights in question under the provisions of Articles 18 (3), 19 (3), 22 (2) and 25 of the Covenant."*[325]

Case focus: Svetik v Belarus, HRC 2000[326]
Freedom to criticise or evaluate State without interference or punishment; State's unlawful limitation of freedoms

The author was a school teacher and representative of a local NGO. A national newspaper published a declaration signed by the author and others appealing for the boycott of local elections as a means to protest against electoral law, which signatories believed was incompatible with the national constitution and international norms. The author was convicted and fined. The author claimed he was subjected to an administrative penalty for expressing his political opinion. The State party claimed that the national law sanction for a public appeal to boycott the elections was in accordance with Article 19(3) limitations. The key issue before the HRC was whether a call to boycott an election was a permissible limitation on the freedom of expression. The State party was held to be in violation of Articles 14(3) and 19 ICCPR.

The HRC recognised that in order to protect the right of every citizen to vote under Article 25(b) State parties should prohibit intimidation or coercion of voters by penal laws, that these laws should be strictly enforced and that "*the application of such laws constitutes, in principle, a lawful limitation of the freedom of expression, necessary for respect of the rights of others.*"[327] Further, the Committee held that, "*intimidation and coercion must be distinguished from encouraging voters to boycott an election.*"[328] The HRC noted that voting was not compulsory in Belarus and the contentious declaration did not affect the possibility of voters to freely decide whether or not to take part in the given election. In a concurring opinion, (referring to the fact there was no compulsory voting system in place) Sir Nigel Rodley stated that: *In any system it must always be possible for a person to advocate non-cooperation with an electoral exercise whose legitimacy that person may wish to challenge. There may be room for flexibility in the means of non-cooperation that may be advocated, be it electoral boycott, the spoiling of ballots, the writing in of alternatives and so on. But, it would be inconsistent with Article 19 to prevent the advocacy of any means of non-cooperation as a challenge to the process itself.*[329]

9 Freedom of Information

It is recognised that the right to freedom of expression also includes the right to access information held by public authorities, commonly referred to as 'freedom of information.' As such, it places a

[323] United Nations, ICCPR, Art. 20(2). See also United Nations, *International Convention on the Elimination of All Forms of Racial Discrimination*, Art. 4(a).
[324] *J. R. T. and W. G. Part v. Canada* (104/1981).
[325] *M.A. v. Italy*, Communication No. 117/1981, U.N. Doc. CCPR/C/OP/2 at 31 (1984). Adopted on: 10 April 1984.
[326] *Svetik v. Belarus.* Communication No. 927/2000. U.N. Doc. CCPR/C/81/D/927/2000 (2004). Adopted on: 8 July 2004.
[327] At para 7.3.
[328] Ibid.
[329] See appendix, para 3.

duty on these bodies to both disseminate information of key public importance and to respond to request for access to publicly held information.

Freedom of information is a crucial right in its own regard as well as central to the functioning of democracy and the enforcement of other rights. Without freedom of information, State authorities can control the flow of information, by withholding material or selectivity releasing news. It is in just such a climate that corruption thrives and violations of human rights go undiscovered. In the particular context of elections, the electorate will not be adequately informed about the actions of their chosen representatives, and thus will be unable to cast an informed vote.

The importance of this right has been repeatedly emphasised by the international community. At its very first session, in 1946, the UNGA adopted Resolution 59 (I), which refers to freedom of information in its widest sense and states:

> *"Freedom of information is a fundamental human right and ... the touchstone of all the freedoms to which the United Nations is consecrated."*[330]

In 1999, the UN Special Rapporteur on Freedom of Opinion and Expression, the Representative on Freedom of the Media of the Organisation for Security and Cooperation in Europe, and the Special Rapporteur on Freedom of Expression of the Organisation of American States adopted a Joint Declaration that stated[331]:

> *Implicit in freedom of expression is the public's right to open access to information and to know what governments are doing on their behalf, without which truth would languish and people's participation in government would remain fragmented.*[332]

The UN Special Rapporteur on Freedom of Opinion and Expression has repeatedly called for States to adopt and implement freedom of information legislation:[333]

> *The Special Rapporteur, therefore, underscores once again that the tendency of many Governments to withhold information from the people at large [...] is to be strongly checked.*[334]

In his 1998 Annual Report, the Special Rapporteur reaffirmed the duty of the State with regard to freedom of information:

> *[T]he right to seek, receive and impart information imposes a positive obligation on States to ensure access to information, particularly with regard to information held by Government in all types of storage and retrieval systems [...].*[335]

The right to access information held by or under the control of a public body has been recognised under Article 19 of both the UDHR and ICCPR. The HRC has repeatedly commented on the need for States to introduce freedom of information laws.[336]

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[330] 14 December 1946.
[331] The Office of the Special Rapporteur on of Opinion and Expression was established by the UN Commission on Human Rights, the most authoritative UN human rights body, in 1993: Resolution 1993/45, 5 March 1993.
[332] 26 November 1999.
[333] See, for example, the *Concluding Observations of the Human Rights Committee in relation to Trinidad and Tobago*, UN Doc. No. CCPR/CO/70/TTO/Add.1, 15 January 2001. 14.
[334] Report of the Special Rapporteur, 4 February 1997, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1997/31.
[335] Report of the Special Rapporteur, 28 January 1998, *Promotion and protection of the right to freedom of opinion and expression*, UN Doc. E/CN.4/1998/40. 14.
[336] In its 1994 Concluding Observations on the implementation of the ICCPR in Azerbaijan, for example, the Committee stated that Azerbaijan "should introduce legislation guaranteeing freedom of information..." UN Doc. CCPR/C/79/Add.38; A/49/40, 3 August 1994, under "5. Suggestions and recommendations".

As a State party to the African Charter, Zimbabwe must respect the freedom of information obligations imposed by the Declaration of Principles on Freedom of Expression in Africa.[337]

Principle IV Declaration of Principles on Freedom of Expression in Africa

1. Public bodies hold information not for themselves but as custodians of the public good and everyone has a right to access this information, subject only to clearly defined rules established by law.

2. The right to information shall be guaranteed by law in accordance with the following principles:

- everyone has the right to access information held by public bodies;

- everyone has the right to access information held by private bodies which is necessary for the exercise or protection of any right;

- any refusal to disclose information shall be subject to appeal to an independent body and/or the courts;

- public bodies shall be required, even in the absence of a request, actively to publish important information of significant public interest;

- no one shall be subject to any sanction for releasing in good faith information on wrongdoing, or that which would disclose a serious threat to health, safety or the environment save where the imposition of sanctions serves a legitimate interest and is necessary in a democratic society; and

- secrecy laws shall be amended as necessary to comply with freedom of information principles.

3. Everyone has the right to access and update or otherwise correct their personal information, whether it is held by public or by private bodies.

The right to access information is recognised under the UN Convention against Corruption,[338] as well as under the AU Convention on Preventing and Combating Corruption.[339]

9.1 The Principles of Freedom of Information

International law and best practice shows that to be effective freedom of information legislation should be based on a number of general principles.

* Most important is the principle of **maximum openness**: any information held by a public body should be in principle openly accessible in recognition of the fact that public bodies hold information not for themselves but for the public good.
* Access to information may be **refused** only in narrowly defined circumstances when necessary to protect a legitimate interest.

[337] Note 39. *The fundamental principles of which were reaffirmed by the African Commission in 228/99*: Law Offices of Ghazi Suleiman/Sudan.
[338] Ratified by Zimbabwe on 8th March 2007.
[339] Ratified by Zimbabwe on 17th December 2006. See Annex.

* Access to information **procedures** should be simple and easily accessible and persons who are refused access should have a means of challenging the refusal in court.[340]

Case focus: Gauthier v Canada, HRC 1995[341]
Freedom to seek, receive, and impart information; principle of maximum openness
The author was the publisher of a small newspaper covering the Canadian Parliament, the National Capitol News. Despite numerous requests, he was denied press credentials for the Parliament which would have given him access to the press gallery, enabling him to take notes during sessions, and to a mailbox where he would receive all press releases. The State party countered that the author could sit in the public gallery, where he could take notes and watch the proceedings on a live Internet feed. Furthermore, all press releases were posted online one day after being distributed at Parliament. The HRC held that the restriction of the author's access to the press facilities in Parliament amounted to a violation of his right under Article 19 ICCPR, to seek, receive and impart information.

The HRC noted "*the importance of access to information about the democratic process*" and found that the exclusion constituted a restriction of the right to information guaranteed under Article 19(2).[342]

The HRC stated that Articles 19 and 25 ICCPR when read together with General Comment No.25 (57), "*implies that citizens, in particular through the media, should have wide access to information and the opportunity to disseminate information and opinions about the activities of elected bodies and their members.*"[343] It was accepted by the HRC that "*such access should not interfere with or obstruct the carrying out of the functions of elected bodies, and that a State party is thus entitled to limit access.*"[344] Any restrictions, however imposed by the State party must be compatible with the provisions of the ICCPR. The protection of parliamentary procedure could therefore be considered a legitimate goal of public order and an accreditation system could be a justified means of achieving this goal. However, as such a system operated to restrict Article 19 rights; it must be shown as necessary and proportionate to such a goal and not arbitrary.

9.2 Restrictions in International Law

In the context of freedom of information, the "necessity" element of international and regional provisions has been interpreted as imposing two important obligations:

1. That documents should be disclosed unless this would cause real harm to a legitimate public interest; and
2. That even if harm is caused, a document should be disclosed if this is in the greater public interest.

For example, disclosure of a government document showing financial transactions may well harm the interest of confidentiality; but if it also reveals corrupt dealings then it is in the overall public interest that it be disclosed.[345]

9.3 Domestic Legislation on Freedom of Information

Article 20 of the Zimbabwean Constitution guarantees the "*freedom to hold opinions and to receive and impart ideas and information without interference*". [346]

[340] Article 19, *The Public's Right to Know* (London: 1999). These Principles are the result of a study of international law and best practice on freedom of information and have been endorsed by, amongst others, the UN Special Rapporteur on Freedom of Opinion and Expression in his report to the 2000 session of the United Nations Commission on Human Rights (UN Doc. E/CN.4/2000/63, annex II). The Special Rapporteur directed attention to nine areas of importance which are annexed hereto from p. 44 of the report. The principles are also referred to by the Commission in its 2000 resolution on freedom of expression (Resolution 2000/38).
[341] *Gauthier v Canada*, Communication No. 633/1995, U.N. Doc. CCPR/C/65/D/633/1995 (5 May 1999).
[342] At para 13.5.
[343] At para 13.4.
[344] Ibid.
[345] Article19, *Freedom of Expression and the Angolan Elections*, August 2007.

There is a formal legislative scheme laid out in the Access to Information and Protection of Privacy Act 2003 ("AIPPA") that is broadly comparable to the schemes of many western democracies.

According to the scheme, "*all records in the custody or under the control of a public body*" are subject to request, and "*every person shall have a right of access to any record [...] that is in the custody or under the control of a public body.*"[347] Any person can make a request provided that they are citizens, permanent residents, holders of temporary employment permits, students, or registered media agents. No "*agent of a foreign state*" may make a request.[348]

The AIPPA also makes provisions for a system of proactive publication, whereby a public body must release information, whether requested or not, if it relates to a risk of significant harm to the health or safety of members of the public, the risk of significant harm to the environment, a matter of national security, or in a range of other eventualities.[349]

9.3.1 Exemptions

The exceptions under the AIPPA are either absolute or discretionary for heads of public bodies.

Absolute exemptions include information relating to:

* the deliberations of cabinet and its committees,
* policy formation,
* client-attorney privilege,
* national security, and
* law enforcement.

The **discretionary** exemptions mean that the head of a public body may, but need not necessarily, refuse to release information that may be harmful to:

* inter-governmental relations or negotiations,
* the financial or economic interests of a public body or the State,
* personal safety,
* protection of heritage sites, or
* where the information would be otherwise available to the public.

In most jurisdictions where freedom of information is constitutionally guaranteed the public interest test weighs in favour of releasing information. However collectively, the exemptions under AIPPA are extensive and broad and in effect invert the public interest test.

9.3.2 Operation

Any application made under this legislation is subject to fees. Duties are imposed upon the public body to respond within time frames, extendable by the Media Information Commission (a government agency widely regarded as enforcing censorship).

9.3.3 Critical response

The AIPPA has attracted criticism and is regarded by some as a way of controlling the press. This is based on a combination of expensive press accreditation and the penalty of potential prison term for failure to register for accreditation. Arguably it allows the State to limit press activity and to monitor those who are involved. High profile actions under the AIPPA have included the closing down of *The Daily News* and the journalists being penalised for writing articles considered to be

[346] The Constitution of Zimbabwe (As amended on 1 February 2007).
[347] Section 4 (1) and Section 5 (1).
[348] Section 5 (3).
[349] Section 28.

hostile to the government. Tromp has indicated that *"[AIPPA's] main purpose is to suppress free speech by requiring journalists to register and prohibiting the 'abuse of free expression'."*[350]

Case focus: Mark Chavunduka and Ray Choto v The Minister for Home Affairs & Attorney General of Zimbabwe[351]

False statements protected by freedom of expression

In a landmark ruling by the Supreme Court, handed down in 2000, the Court demonstrated its willingness to strike down legislation inconsistent with Section 20 of the Constitution. In the *Chavunduka case*, the Court held that a statutory prohibition on "false news" undermines the realisation of the right of freedom of expression (*Law and Order Maintenance Act* 1960, section 50(2) (a)). On 10 January 1999, *The Standard* newspaper published a story alleging that there had been an unsuccessful coup attempt in the Zimbabwean army. Two days later, Mark Chavunduka, the editor of *The Standard*, was arrested and held for over a week. Raymond Choto, the author of the article, voluntarily surrendered himself to the police. Both were severely tortured and later spent time in the UK receiving treatment. They were charged, with amongst other things, publishing false statements likely to cause fear, alarm or despondency among the public. The Supreme Court held that false statements were protected by the constitutional guarantee of freedom of expression, and that Section 50(2)(a) of LOMA breached that guarantee. Despite the Supreme Court ruling, within two years the Zimbabwean government enacted Section 80 of the AIPPA which prohibits publishing false information which threatens the interests of the State (amongst other things).

The Commission has previously recommended that Zimbabwe:

* Repeal Sections 79 and 80 of the AIPPA;
* Decriminalise offenses relating to accreditation and the practice of journalism;
* Adopt legislation providing a framework for self regulation by journalists;
* Bring AIPPA in line with Article 9 of the African Charter and other principles and international human rights instruments; and
* Report on the implementation of these recommendations within six months of notification thereof.

A Zimbabwe Country Report on Human Rights stated that "*as of [the end of 2010], the government had not taken any action to repeal sections 79 and 80 of the AIPPA as ordered to do by the ACHPR in 2009*."[352]

10 Freedom of Assembly

The issue is more complex than a choice between two extremes – one of the right to protest whenever and wherever you want – the other a right to continuous calm on the streets.[353]

Freedom of assembly is an essential part of the activities of political parties and of the conduct of elections, and thus a fundamental pre-requisite right to establish the necessary conditions for free elections.

[350] Tromp, Stanley, "*Fallen Behind: Canada's Access to Information in the World Context*", p. 19.
[351] *Mark Chavunduka and Ray Choto v The Minister for Home Affairs & Attorney General of Zimbabwe* (hereinafter referred to as "the Chavunduka case").
[352] US-DOS 2010 *Country Reports on Human Rights Practices*, published: 8 April 2011, http://www.state.gov/g/drl/rls/hrrpt/2010/af/154377.htm.
[353] Lord Scarman, Red Lion Square Inquest.

The right to organise and participate in a peaceful assembly is one of the fundamental freedoms and a cornerstone of any democratic society. Public assemblies provide an opportunity for the mobilisation and display of support for diverse opinions including radical, marginal and unpopular positions and the views of minority groups. Public assemblies often become increasingly prominent and significant in the context of elections as political parties, candidates and other groups and organisations seek to publicise their views and mobilise support. Public assemblies can also be regarded as particularly contentious at election time; they can be considered as a threat by the State and may be subjected to a variety of constraints and restrictions.

The OSCE Guidelines on Freedom of Peaceful Assembly state;

> *[…] freedom of peaceful assembly constitutes a form of direct democracy. It facilitates dialogue within civil society, as well as between civil society, political leaders, and government.*

The right to organise and participate in a peaceful assembly is also an important element of the freedom of expression. This right is expressed in various international and regional treaties.

In its concluding observations on Iraq the HRC expressed concern about the "*severe restrictions on the right to express opposition to or criticism of the Government or its policies*" and about the fact that "*the law imposes life imprisonment for insulting the President of the Republic, and in certain cases death.*" The HRC also noted that "*such restrictions on freedom of expression, which effectively prevent the discussion of ideas or the operation of political parties in opposition to the ruling Ba'ath party, constitute a violation of Articles 6 and 19 of the Covenant and impede the implementation of Articles 21 and 22 of the Covenant, which protect the rights to freedom of peaceful assembly and association*". Further, it observed that the penal laws and decrees imposing restrictions on the freedoms of expression, peaceful assembly and association should be amended so as to comply with the relevant provisions of the Covenant.[354]

On 28 March 2007, the Congress of Local and Regional Authorities of the Council of Europe, adopted a resolution on the freedom of assembly and expression for lesbians, gays, bisexuals and transgendered persons.[355] The resolution states that: "*It is the paramount duty of local authorities not only to positively protect the rights to freedom of assembly and expression in a practical and effective manner, but also to refrain from speech likely to legitimise discrimination or hatred based on intolerance*".

10.1 Relevance to Election Cycle

Freedom of assembly is particularly relevant to candidacy and campaigning. With regards to the campaign period, the OSCE has indentified that political parties, candidates and citizens have the right to organise and participate in public rallies and conduct legitimate campaigning without undue influence.[356]

As freedom of assembly is integral to fostering communication between citizens and political leaders it has been recognised that this right must be respected in regards to political rallies and meetings.[357]

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[354] UN doc. *GAOR*, A/53/40 (vol. I), p. 21, para 105; http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.84.En?Opendocument.

[355] "*Appeal to Mayors of European cities 'On freedom of assembly and expression for lesbian, gay, bisexual and transgender people'*", ILGA Europe, http://www.ilga-europe.org/home/how_we_work/previous_projects/campaign_on_freedom_of_assembly_and_expression/appeal_to_mayors_of_european_cities_on_freedom_of_assembly_and_expression_for_lesbian_gay_bisexual_and_transgender_people.

[356] OSCE, Copenhagen, para. 9.2.

[357] OSCE/ODIHR, *Guidelines on Freedom of Peaceful Assembly*, para 1.1.5. See also, IPU, *Declaration on Criteria for Free and Fair Elections*, Article 4.

Article 20(1) UDHR

Everyone has the right to freedom of peaceful assembly.

Article 21 ICCPR

The right of peaceful assembly shall be recognised. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

Article 11 African Charter

Everyone shall have the right to assemble freely with others. The exercise of this right shall be subject only to necessary restrictions provided for by law in particular those enacted in the interest of national security, the safety, health ethics and rights and freedoms of others.

Article 5(d)(ix) CERD

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

[...] (d) Other civil rights, in particular:

[...](ix) The right to freedom of peaceful assembly and association; Article 15, CRC

Article 15 Convention on the Rights of the Child

1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.

2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others.

SADC Principles and Guidelines Governing Democratic Elections

Safeguard the human and civil liberties of all citizens including the freedom of movement, assembly, association, expression and campaigning as well as access to the media on the part of all stakeholders, during electoral processes as provided for under 2.1.5 above [Equal opportunity for all political parties to access the State media].

In addition to these instruments, the right to freedom of assembly is provided for under various regional instruments on human rights such as the ECHR and the ACHR of 1969.[358]

10.2 Core Principles of Interpretation

Freedom of assembly is an essential part of the activities of political parties and of the conduct of elections.

Genuine, effective freedom of assembly does not merely impose a duty on the part of the State not to interfere with its exercise, but also requires that positive measures be taken. A purely negative conception of this right is said not to be compatible with its object and purpose. Generally:

- Any assembly deemed to be **peaceful** merits the protection of Article 21 of the ICCPR.
- Any restriction must be **necessary** for one of the stipulated interests in a democratic society.
- The restriction must also be "in conformity with the **law**." That is to say, any interference with this right by an agent of the State must not be arbitrary but must be authorised by law.
- Any restriction of this right must be **proportionate**, otherwise termed as the use of the least restrictive means that can be employed to protect the public interests cited in the provision.
- The State is also under a duty to **protect** the demonstrators themselves.

10.3 Interference with the Right to Assembly

The positive duty of the State equates to the duty to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.

It is not an absolute right but is subject to certain restrictions. The State has however, a wide discretion in the choice of the means to be used to ensure the exercise of this right.

Case focus: Lawyers for Human Rights v Swaziland, ACHPR 2002[359]
Duty on State to maintain compliant laws
A human rights based NGO complained against the Kingdom of Swaziland that a royal proclamation issued by King Sobhuza I in 1973 declaring that the King had assumed supreme power was contrary to the ACHPR. In addition he had repealed the 1968 Constitution which itself provided for a justiciable Bill of Rights and secured the protection of fundamental human rights, including the right to freedom of association and assembly.

The complainant alleged that the provisions of the Proclamation outlawing political parties violated the Swazi people's freedom of association, expression and assembly as enshrined in the ACHPR.

The ACmHPR held, *inter alia*, that the proclamation amounted to a violation of Articles 10 and 11 of the ACHPR. Although the proclamation restricting the enjoyment of these rights was enacted prior to the coming into effect of the ACHPR, Swaziland had an obligation to ensure that the proclamation conformed to the ACHPR when it was ratified in 1995. As it failed to comply with this duty, *"the prohibition on the establishment of political parties under the Proclamation remained effective and consequently restricted the right to freedom of association and assembly of its citizens."*

10.4 Scope of the Right to Peaceful Assembly

The right to peaceful assembly covers a range of activities and gatherings including both private meetings and meetings in public thoroughfares,[360] static meetings and public processions (assemblies in motion).

[358] Articles 11 and 15 respectivly.
[359] **251/02: *Lawyers of Human Rights/Swaziland*, http://caselaw.ihrda.org/doc/251.02/view.**
[360] *Rassemblement Jurassien & Unite Jurassienne* v. *Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93.

The right itself can be exercised by individual participants of an assembly and also by those organising it, including a corporate body. It means that the individual should be protected against all kinds of interference in the exercise of this right, not merely governmental interference.

A demonstration in the form of assembly which may annoy or give offence to persons opposed to the claims or ideas expressed, must be permitted without demonstrators fearing they will be subjected to violence by their opponents (as such fear would be liable to deter others from openly expressing views on controversial issues which may affect the community).

The right extends only in respect of '**peaceful'** assembly, 'peaceful' does not cover a demonstration where organisers have violent intentions which result in public disorder.

Case focus: Ramson v Barker, Court of Appeal of Guyana, 1982[361]
Public thoroughfares: need for direct hindrance
This case involved the dispersal of a political meeting by the police. The plaintiff, an attorney, brought an action alleging, inter alia, an infringement of his right to freedom of assembly, expression and movement. It was held by the Court of Appeal that there was directed towards a hindrance of these constitutional freedoms.[362]

The Court of Appeal of Guyana, however, held that where three persons were required by the police to remove themselves from their stationary position on a road, their freedom of assembly was not 'hindered'. Their presence at the particular location from which they were required to move was neither an essential nor even an optional prerequisite to the exercise of their right of assembly.

Further, the Court expressed that an infringement of the fundamental right to personal liberty must be one which is both direct and tangible. They cited with approval the definition of "personal liberty" as including "*the power of commotion, of changing situation, or removing one's person to whatever place one's inclination may direct without imprisonment or restraint, unless by due process of law*."[363]

Case focus: G v. the Federal Republic of Germany, ECHR 1989[364]
Disruptive or violent demonstrations
The ECmHR held that the police were acting within their power when they arrested the applicant for blocking a public road during a protest. The Commission decided that the protest was causing more disruption than was reasonable and would normally arise in the exercise of the right of freedom of assembly. Although a sit-in on a public road is not a violent demonstration and falls within the ambit of Article 11(1), a conviction for unlawful coercion is not disproportionate to the aims pursued, namely prevention of disorder.

The Commission stated that 'peaceful assembly' does not cover a demonstration where the organisers and participants "*have violent intentions which result in public disorder*."[365]

Furthermore, the Commission held that it was the responsibility of the local police to decide what was an acceptable level of disruption to other people and when it was 'necessary in a democratic society' to disperse the protest or if necessary to arrest the participants.

Inconvenience to others should not be equated with a demonstration ceasing to be peaceful, some **inconvenience** must be expected, and inconvenience alone does not justify interference with the

[361] *George Daniel v. The Attorney General of Trinidad and Tobago*, HCA 393 of 2005, http://webopac.ttlawcourts.org/LibraryJud/Judgments/HC/bereaux/2007/HCA_05_393DD20July2007.pdf, (int 24, para 2).
[362] *Advocates Coalition for Development and Environment v. Attorney General*, Miscellaneous cause no. 0100 of 2004, http://www.greenwatch.or.ug/pdf/news/publications/Environmental_Law_Case_Book_1.pdf, at p. 168 in the case *Rev. Christopher Mtilila v. The Attorney General* (1993).
[363] Ibid.
[364] *G v The Federal Republic of Germany* (1989).
[365] *G v The Federal Republic of Germany* (1989) at p. 263.

right. The least intrusive means of achieving an objective should always be preferred - and that includes the penalties that are imposed for breaching rules regulating the holding of assemblies.[366]

The right can be restricted where there is the possibility and a real risk of violent disorder by developments outside the control of the organisers and participants of a procession, and should not forfeit **protection** of the right of assembly. Any restriction placed on such an assembly must be in conformity with the law and for the purpose of protecting one or more of the specified interests.[367]

The State is not absolved of human rights obligations when controlling violent assemblies.

Case focus: Concluding Observations on Denmark, HRC 18 November 1996[368]
Methods of crowd control
HRC considered Denmark's obligations undertaken under the ICCPR as submitted in its third periodic report. HRC commented that it had concerns with;

"*…with the methods of crowd control employed by the police forces, including the use of dogs, against participants in various demonstrations or gatherings which, on certain occasions, have resulted in the serious injuries to persons in the crowds, including bystanders*" (para 14.)

HRC's comments confirm that peaceful participants in violent assemblies remain under the protection of Article 21, ensuring that methods of crowd control are "*necessary in democratic society in the interests of national safety or public safety, public order…or the protection of the rights and freedoms of others*".

By the fact that HRC urged "*the Government of the State party to further the training of the police forces in methods of crowd control and of handling offenders…and to keep these issues constantly under review*" (para 21) this furthermore confirms that the State must continue its human rights obligations in controlling violent assemblies and that all participants remain under the protection of other ICCPR provisions.

The **purpose** of the meeting, and not the criminal records of the participants or the auspices of the organisation under which the meeting is held, is a critical factor in determining whether the right to free assembly has been improperly proscribed.

Case focus: De Jonge v Oregon, United States Supreme Court, 1937[369]
Freedom of assembly; purpose of the meeting; right to organise a political party/political assembly advocating industrial or political change in revolution
The Supreme Court of the United States held that the Fourteenth Amendment's due process clause applies to freedom of assembly. The Court found that the applicant had the right to organise a Communist Party and to speak at its meetings, even though the party advocated industrial or political change in revolution.

Criminal punishment under a State statute for participation in the conduct of a public meeting, otherwise lawful, merely because the meeting was held under the auspices of an organisation which teaches or advocates the use of violence, violates the constitutional principles of free speech and

[366] *Benchmarks for Laws related to Freedom fo Assembly and List of International Standards*, OSCE, http://www.osce.org/odihr/37907.
[367] *Christians against Racism and Fascism v. United Kingdom,* European Commission, (1980) 21 *Decisions & Reports* 138.
[368] *UN Human Rights Committee: Concluding Observations: Denmark*, 18 November 1996, HRC, http://www.unhcr.org/refworld/country,,HRC,,DNK,,3ae6b02614,0.html.
[369] *Dejonge v. Oregon*, 299 U.S. 353 (1937), http://supreme.justia.com/us/299/353/case.html.

assembly. Therefore, it was held by the Supreme Court that the Criminal Syndicalism Law of Oregon, as applied in the case, was unconstitutional.

If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against public order, they may be prosecuted for their conspiracy or violation of law. But it is a different matter when the state, instead of prosecuting them for such offences, seizes upon mere participation in a peaceful assembly and a lawful discussion as the basis of a criminal charge.

Case focus: Khan v The District Magistrate, Lahore and the Government of Pakistan, Supreme Court of Pakistan[370]

Uninvited police presence at a meeting incompatible with freedom of assembly; deterrent effect

The Supreme Court that the presence at a meeting of uninvited police officers who take notes of its proceedings is incompatible with the right to freedom of assembly since such presence could act as a deterrent to the public to assemble together and may even stifle the meeting altogether.

Further, they stated that '*No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law [Section 21 of the ICCPR]*'.

A requirement to notify the police of an intended demonstration in a public place sometime before its commencement may be compatible with the permitted limitations. A requirement to pre-notify a demonstration will normally be for reasons of national security or public safety, public order, the protection of health or morals, or the protection of the rights and freedoms of others. Such a procedure may be necessary in order that the authorities are in a position to ensure the peaceful nature of a meeting or procession.

A domestic provision of law, which empowered a Magistrate to depute one or more police officers or other persons to attend any public meeting for the purpose of causing a report to be made of the proceedings, was held to be inconsistent with the constitutional guarantee of the freedom of assembly and association.

10.5 Guidelines on Freedom of Peaceful Assembly

The OSCE/ODIHR – CoE Venice Commission Guidelines on Freedom of Peaceful Assembly (hereinafter 'Guidelines') highlight key issues relating to freedom of assembly in the context of elections. Whilst not binding they are both helpful and persuasive guidance on the interpretation of the relevant provisions of the ICCPR and the ACHPR. The Guidelines have been summarised here.

10.5.1 Definition of an Assembly

Assembly is defined as '*an intentional and temporary presence of a number of individuals in a public place that is not a building or structure, for a common expressive purpose*'.[371]

Public places include:

* streets,
* sidewalks,
* parks (open public spaces), and
* assemblies held inside buildings or on private property.

[370] *Khan v. The District Magistrate, Lahore and the Government of Pakistan, Supreme Court of Pakistan,* Pakistan Legal Decisions, 1965, W.P. Lahore, p. 642. See also (1966) 7(2) Journal of the International Commission of Jurists, pp. 284-6.
[371] In *Eva Molnar v Hungary*, 2008, the Court recognised eight hours as reasonable for a spontaneous assembly.

Protection of this right only relates to 'peaceful' assemblies, it is not undermined by provocation, interference to daily routines, offence or annoyance towards groups or individuals or presentation of controversial or challenging views.

10.5.2 Presumption in favour of holding assemblies

Freedom of peaceful assembly is a fundamental right and as such should, as far a spossible be enjoyed without restriction. Ideally, the starting point for regulation of this right should be a presumption which favours the freedom to assemble. With that said requiring prior notification does not on its own not violate the right.

10.5.3 The State's duty to protect peaceful assembly

In addition to allowing peaceful assembly to take place, states also have a responsibility to have in place adequate mechanisms to protect individuals.

This includes a responsibility to provide traffic control, and respond sensitively to unlawful assemblies, spontaneous assemblies and simultaneous assemblies as outlined below:

* **Unlawful** assemblies: Include assemblies that have failed or refused to provide notification(s) according to certain legal requirements and events that have been banned or have had restrictions imposed on them. According to the ECtHR, *it is necessary for* the authorities to show tolerance where there is no violence.[372]

* **Spontaneous** assemblies: Authorities must allow for people to respond at short notice to news or events Notification requirements should not be used to impose unreasonable limits on spontaneous demonstrations.

* **Simultaneous** assemblies: Arises when two or more organisations seek to assemble in close proximity, or when a group plan to protest against another assembly. The ECtHR has held th*at where possible* the authorities should take measures to ensure all assemblies can take place.[373]

10.5.4 Restricting Freedom of Peaceful Assembly

There are exceptions to freedom of assembly.

The ICCPR permits restrictions on this right only if they are:

(i) imposed in conformity with the law and necessary in a democratic society;
(ii) in the interests of national security or public safety;
(iii) public order (ordre public),
(iv) the protection of public health or morals; or
(v) the protection of the rights and freedoms of others.

Article 11(2) ECHR sets out similar conditions and has outlined further conditions for restrictions in its case law:

(i) restrictions should be set down in a manner that is precise and comprehensible;
(ii) the need for proportionality is critical: preference given to the least intrusive means of restriction or control;
(iii) restrictions may legitimately be imposed following the rubric of reasonable regulation of time, place and manner;
(iv) wherever possible such restrictions should be imposed following dialogue or consultation with the organisers;
(v) prohibiting a peaceful assembly is a matter of last resort;

[372] *Oya Ataman v Turkey*, 2007; *Balcik v Turkey*, 2007.
[373] *Ollinger v Austria*, ECtHR 2006.

(vi) blanket prohibitions should only be imposed in extreme circumstances;
(vii) restrictions should not be imposed on the content of speeches or visual displays except in extreme situations for instance, whereby they seek to promote hatred or where they incite imminent acts of violence.[374]

10.6 Restrictions Imposed by Law

According to the ICCPR, restrictions must be '**in conformity with the law'**. This is a slightly different test to 'prescribed by law' in Articles 12, 18, 19 and 22, which permits the exercise of more administrative discretion in imposing limits, as compared to the other articles.[375]

The requirement to **notify** the police of intended demonstrations in a public place sometime before commencement may still be compatible. A requirement to pre-notify can be for reasons of national security or public safety.[376] However, the length of the notice period may be incompatible. Appeal mechanisms against a refusal of permission to hold a public demonstration are required.[377]

Restrictions contain measures, including punitive ones, taken after the exercise of this right.

Case focus: Re Munhumeso and Others, Supreme Court of Zimbabwe 1994
Discretion in imposing limits on public processions
Section 6(1) of the Law and Order (Maintenance) Act empowered the regulating authority to issue directions for the purpose of controlling the conduct of public processions within his area and the route by which and the times at which a public procession may pass, the discretionary power of the regulating authority is uncontrolled. He may issue a direction prohibiting the right to form a public procession upon a ground not related in any way to conditions of public safety or public order. There is no definition of the criteria to be used by him in the exercise of the discretion. Moreover, before imposing a ban on a public procession the regulating authority is not obliged to take into account whether the likelihood of a breach of the peace or public disorder could be averted by attaching conditions upon the conduct of the procession in the issuance of a permit relating to, for instance, time, duration and route.

The Court held that if the potential disorder could be prevented by the imposition of suitable conditions, then it is only reasonable that such a less stringent course be adopted than an outright ban. Accordingly, the provision is not 'reasonably justifiable in a democratic society' in the interests of public safety or public order.

Penalties for holding a public procession without a permit
The Court was also critical of s. 6 (6) of the Law and Order (Maintenance) Act which provides that any person who contravenes, directs or takes part in a public procession for which a permit has not been obtained shall be guilty of an offence and may be arrested without a warrant, and shall be liable to a fine or to imprisonment. The holding of a public procession without a permit is criminalised irrespective of the likelihood or occurrence of any threat to public safety or public order, and even of any inconvenience to persons not participating.

Case focus: Ezelin v France, ECtHR 1991[378]
The 'necessity' of sanctions and penalties
The applicant in his capacity as vice-chairman of a union of Guadeloupe advocats took part in a duly authorised public demonstration against the imprisonment of certain independence movement leaders. In the course of the demonstration insulting remarks were addressed to the police, and inscriptions, directed notably against the judiciary, were painted on public buildings. At the instigation of the State Prosecutor, disciplinary proceedings were subsequently taken against the

[374] *Osmani and Other v FYROM*, ECtHR 2001.
[375] M. Novak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (N.P. Engel, Kehl, 1993), 378.
[376] *Kivenmaa v. Finland*, Human Rights Committee, Communication No. 412/1990, 31 March 1994.
[377] *Concluding Observations on the Kyrgyz Republic*, (2000) UN doc. CCPR/CO/69/KGZ, para 22.
[378] *Ezelin v. France* [1991] ECHR 29; 11800/85.

applicant. The Council of the Guadeloupe Bar Association decided that no sanction was called for, but on appeal a disciplinary penalty of a reprimand was imposed. The applicant alleged that the penalty constituted an infringement of his rights to freedom of expression (Article10 ECHR) and the freedom of assembly (Article 11 ECHR).

The interference was prescribed by law and had a legitimate aim, namely the prevention of disorder, the only question was whether the interference was *"necessary in a democratic society"*. The proportionality principle demanded that a balance be struck between the requirements of the purposes listed in Article 11 (2) and those of the expression of opinions. The Court noted that the penalty imposed on the applicant was at the lower end of the scale of disciplinary penalties and had had mainly moral force. A disciplinary penalty of a remand imposed on an advocate who participated in a procession was a restriction, the legal basis of the sanction lying in special rules governing the profession.

It considered, however, that the freedom to take part in a peaceful assembly was of such importance that it could not be restricted in any way, even for an advocate, so long as the person concerned did not himself commit any reprehensive act on such an occasion. The sanction, however minimal, did not appear to have been "*necessary in a democratic society*". The Court held by six votes to three that there had been a violation of Article 11.

An unfettered discretion to control this right is incompatible with it: a fundamental right should not be subject to the arbitrary control of an official.

Case focus: The Police v Moorba, Supreme Court of Mauritius 1971[379]
Arbitrary control of fundamental right by an official
The Public Order Act 1970 empowered the commissioner of police to prohibit the holding or continuance of a public meeting in any area on any particular day if such prohibition appeared to him to be necessary or expedient in the interests of public safety or public order. The discretion was not unfettered as he could only prohibit a meeting for specific reasons and for a limited time and the DPP controlled any prosecutions for contravention of his order.

10.7 Restrictions Which are Necessary in a Democratic Society

10.7.1 Proportionality

The principle of proportionality must be taken into account in determining whether a restriction is 'necessary'. Proportionality demands a balance to be struck between the right of the individual to peacefully assemble in a public place and the rights of others affected by their acts. The pursuit of a just balance must not result in individuals being discouraged for fear of sanctions from expressing their opinions.[380]

Case focus: Law Offices of Ghazi Suleiman v Sudan, ACHPR 1999
Prevention of peaceful gathering
The partner of a law firm was invited by a group of human rights defenders to deliver a public lecture in Sinnar. He was allegedly prohibited from travelling to Sinnar by security officials who threatened that he would be arrested if he made the trip. This threat and the implied threat of repercussions for the group meant that he did not embark on the trip.

[379] *The Police v Moorba, Supreme Court of Mauritius* 1971, The Maritius Reports 199.
[380] *Ezelin v. France,* European Court, (1991) 14 EHRR 362. Such a balance had not been struck in the case of an advocat (and trade union leader) who was reprimanded by the court for a "breach of discretion amounting to a disciplinary offence" in that he had participated, by carrying a placard, in a demonstration and failed to dissociate himself from the demonstrators offensive and insulting acts.

The ACmHPR held, *inter alia*, that there had been a violation of Articles 10 and 11 of the ACHPR. By preventing him from gathering with others to discuss human rights and by threatening to punish him for doing so, the respondent State had violated his human rights to freedom of association and assembly. The ACmHPR stated that *"[t]he fact that Mr Ghazi Suleiman advocates peaceful means of action and his advocacy has never caused civil unrest is additional evidence that the complained about actions of the Respondent State were not proportionate and necessary to the achievement of any legitimate goal. Furthermore, the actions of the government of Sudan not only prevent Mr Ghazi Suleiman from exercising his human rights, but these actions have a seriously discouraging effect on others who might also contribute to promoting and protecting human rights in Sudan."*

10.7.2 Necessity

The concept of 'necessity' must be taken into account and implies an imperative social requirement.[381] Therefore, a general ban of demonstrations can be justified only if there is a real danger of disorder which cannot be prevented by other less stringent measures.

Pre-requisites to a determination that a general ban is 'necessary' include:

* whether the disadvantage of the ban is clearly outweighed by **security** considerations justifying the ban;
* that there is no possibility of avoiding undesirable effects of a ban by the imposition of **conditions** circumscribing its scope in terms of territorial application and duration.[382]

Case focus: Sir Dawda K. Jawara v The Gambia, ACHPR 2000[383]
Blanket ban on political parties taking part in political activity
The complainant, the former Head of State of the Republic of the Gambia alleged that there had been a "blatant abuse of power" by the military junta shortly after the military coup overthrew his government in 1994. In addition to carrying out a reign of terror, intimidation and arbitrary detention, it was alleged that the military government banned political parties and ministers of the former civilian government from taking part in any political activity.

The ACmHPR held, *inter alia*, that the banning of political parties constituted an encroachment on the freedom of assembly guaranteed by the right to assemble freely with others under Article 11 of the ACHPR.

10.8 General Restrictions

General restrictions to a right include those which are in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.

In Austria 'National security' was invoked successfully to justify a prohibition of a public meeting in Vienna expected to advocate the 'reunification of Austria with Germany'.[384] In Switzerland 'public

[381] *Rassemblement Jurassien & Unite Jurassienne v. Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93.
[382] *Christians against Racism and Fascism v. United Kingdom*, European Commission, (1980) 21 *Decisions & Reports* 138. The Public Order Act 1936 in this case was held to exclude any possibility of arbitrary measures being taken against a particular procession. The Act did not exclude the possibility of imposing specific conditions for holding a procession but allowed for general measures such as a ban on all processions in a certain area during a specified time.
[383] *Dawda Jawara v. The Gambia, African Commission on Human and Peoples' Rights*, Comm. Nos. 147/95 and 149/96 (2000), http://www1.umn.edu/humanrts/africa/comcases/147-95.html.
[384] *H v. Austria*, European Commission, Application 9905/82, (1984) 36 *Decisions & Reports* 187

safety' was accepted as a ground for upholding a ban on all political meetings within a specified area and for a limited period.[385]

The concept of 'public order' has developed and has given rise to further interpretation:

* It can only be invoked if there are well-founded reasons to believe that there is 'a possibility of a practical **disturbance** likely to undermine public order' or if the police can prove the existence of a real and immediate danger of disturbance of public order.[386]
* It cannot be invoked to **stifle** the message to be disseminated by the procession.
* The threat to 'public order' must arise from the **nature** of the demonstration.

Serious disruption to traffic and **inconvenience** to the public cannot justify a total prohibition on a procession unless the police can demonstrate that it is impossible to take precautions such as temporal and geographical limitations on the procession to allow the exercise of free assembly.

The balance to be struck is between the rights of the residents of a city to free passage and the right to free assembly – but residents must expect some inconvenience to be caused to them by public events – police may impose limits on processions to minimize disruption. In Israel, the burden on the police of policing a procession has been rejected as a basis for the disallowance of it.[387] It is the duty of the police to allocate manpower as required for maintenance of daily life which includes demonstrations and processions.

Case focus: Report of the Inquiry into the Red Lion Square Disorders of 15 June 1974[388]
Disruption to traffic and free passage of residents (2)
On 15 June 1974 a demonstration in London against the National Front organised by the London and Home Counties Area Council of Liberation led to disorder in Red Lion Square, during which a Warwick University student sustained fatal injuries. The coroner's inquest into his death returned a verdict of death by misadventure. A public inquiry was conducted by Lord Justice Scarman between July and November 1974 to review the events that led to the disorder and to consider whether any lesson might be learned for the better maintenance of public order during demonstrations.

Lord Scarman noted that the issue is more complex than a choice between two extremes – one of the right to protest whenever and wherever you want – the other a right to continuous calm on the streets. He stated that *"A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens, who are not protesting, to go about their business and pleasure without obstruction or inconvenience. The fact that those who at any time are concerned to secure the tranquility of the streets are likely to be the majority must not lead us to deny the protestors their opportunity to march: the fact that the protesters are desperately sincere and are exercising a fundamental human right must not lead us to overlook the rights of the majority."*

Case focus: State v The President of Malawi & Ors; Ex Parte the Malawi Law Society & Ors[389]
State's arbitrary ban on 'demonstrations'
The President of Malawi directed, during a political rally, that there should be no "demonstrations" for or against an envisaged amendment to the Constitution allowing him to serve unlimited terms in office. He also directed that the Minister of Home Affairs, the Inspector General of Police, and the Army commander should deal with anyone violating the directive. The Malawi Law Society and a number of other civil rights organisations and citizens applied for judicial review, arguing that the

[385] *Rassemblement Jurassien & Unite Jurassienne v. Switzerland*, European Commission, (1980) 17 *Decisions & Reports* 93.
[386] *Sa'ar Adv. et al v. Minister of the Interior and of the Police*, Supreme Court of Israel, 34(2) Piskei Din 169 excerpted in (1982) 12 *Israeli Yearbook on Human Rights* 296.
[387] *Sa'ar Adv. et al v. Minister of the Interior and of the Police*, Supreme Court of Israel, 34(2) Piskei Din 169 excerpted in (1982) 12 *Israeli Yearbook on Human Rights* 296.
[388] *Report of the Inquiry into the Red Lion Square Disorders* of 15 June 1974 (Cmnd 5959, 1975), paragraph 5.
[389] *State v. The President of Malawi & Ors; Ex Parte the Malawi Law Society & Ors* [2002] ICHRL 15; (2003) 4 CHRLD 3.

directives unreasonably fettered, *inter alia,* the rights to freedom of association, assembly and demonstration.

In allowing the application the court held that the word 'demonstration' has broad meaning encompassing '*show or display of attitudes towards a person, cause or issue'* and not merely *"a public manifestation of feeling often taking the form of a procession or mass meeting"*. Accordingly, the directive that there should be no demonstrations at all was held to be too wide and impossible to enforce. Further, if enforced at all, the directive would completely take away the rights enshrined in the Constitution.
Any restriction or limitation on the rights can only be implemented where it is prescribed by law of which was not the case here. Accordingly, the President does not have the power under the constitution to make laws and therefore his directives do not amount to prescription by law. In addition, there are numerous other laws regulating assemblies, preventing rioting and governing defamation.

10.9 African Union

10.9.1 Distinctions in international and regional instruments

Almost all instruments providing for freedom of assembly include in the very provision in which the right is provided the requirement for the assembly to be "**peaceful**". The only instrument that does not use this term is the ACHPR, which instead makes the exercise of the right to assemble subject to necessary restrictions provided for by law, in particular those enacted in the interest of national security and the safety, health, ethics and the rights and freedoms of others.

Under Article 10(1) ACHPR, an individual has the right to free association "*provided that he abides by the law*." This has been interpreted as a particularly strongly worded qualification. Commentators have expressed concern that the term "law" in this provision can be interpreted to justify and excuse any action whatsoever taken by governments, as long as such action is couched in legislation or otherwise conforms with "law."[390]

The ACmHPR, established under the ACHPR, has attempted to mitigate the potential abuse of this provision by avoiding a rigid and positivistic approach to its interpretation. In its resolution on the right to freedom of association, adopted at the 11th Ordinary Session,[391] the ACmHPR called upon governments not to "*enact provisions which would limit the exercise of this Freedom*." The resolution also stated that any regulation on the exercise of freedom of association "*should be consistent with States' obligations under the African Charter*." The obligations referred to are considered to be those relating to the enjoyment of the rights and freedoms guaranteed under the Charter,[392] including freedom of association.

In addition to specific limitations, the freedoms of association and assembly are subject to general limitations which apply to all provisions.[393] In situations of emergency, states are permitted by international instruments to take temporary measures which may derogate from most human rights.[394]

10.10 Domestic Provisions and Cases

The right to freedom of assembly is protected under the laws of Zimbabwe.

[390] Heyns, C, (ed), Human Rights Law in Africa (1977) p. 89.
[391] Fifth Annual Activity Report, at 28.
[392] According to Heyns, ibid, p. 104.
[393] See e.g. Article 30 of the UDHR and Article 4 of the ICESCR.
[394] See e.g. Article 4 of the ICCPR; Article 15 ECHR

Article 21 Constitution of Zimbabwe

21 Protection of freedom of assembly and association

(1) Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

(2) The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.

(3) Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision—

(a) in the interests of defence, public safety, public order, public morality or public health;
(b) for the purpose of protecting the rights or freedom of other persons;
(c) for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations; or
(d) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

(4) The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles.

In Zimbabwe the above right is regulated by the Public Order and Security Act [Chapter 9:23] (POSA). It was amended in 2007 so that appeals against decisions to ban a demonstration or a march are now decided by a Magistrate Court and not the executive.

The amendments also introduced a ban on the holding of demonstrations outside specific buildings including the Parliament, Courts and other public institutions; unless permission is granted by the relevant authority of the building such as the Chief Justice, speaker, etc.

Under the amendments, additional information is required to be submitted before a meeting is approved; previously only the name of the organisation was required, now the name of the convenor and a deputy must also be given.

The amendments also require the organisers and the police to enter into a dialogue before a decision is made to ban a meeting or demonstration.

Case focus: MDC v Commissioner of Police and Others, 2010
Illegality of banning political rallies
In ZLHR's commentary of the case the state that*: "This appeal challenged the ban of rallies by the police in respect of Mbare, Chitungwiza, Harare South and Harare Central districts. At the hearing, the legal*

representatives for the Respondents (the Commissioner of Police and Others in this case), conceded that prohibition orders that banned rallies in Harare South and Mbare district were void. The legal representative for the Respondents withdrew the prohibition orders at the hearing. They further submitted that the appellant (MDC) and/or any other non-political organisations were free to hold rallies in these two areas. The parties in the MDC v Commissioner case agreed that the prohibition orders in the remaining districts, namely Harare Central and Chitungwiza had not been properly gazetted as required by POSA. It can thus be inferred that the actions of the police were illegal per se as they had not followed the provisions of POSA."[395]

Case focus: MDC v The Minister of Home Affairs and Others (Ref: HH 142/2008)
Illegality of banning political rallies (2)
ZLHR interprets the case as follows: *"The police unilaterally banned "Freedom Marches" organised by the then-opposition MDC after conducting meetings with conveners where they attempted to defeat the cause of the march by altering the route (see MDC v The Minister of Home Affairs and Others - Ref: HH 142/2008). In the past the banning of rallies was done without following the provisions of POSA that require publication of a ban in a newspaper in the area where the convener is likely to conduct the gathering. The MDC (Tsvangirai) had complained that in recent weeks the police had banned all rallies in Masvingo and that armed riot police broke up one of their rallies in Kadoma. The courts held that such "bans" were unlawful."*[396]

Case focus: MDC v Minister of Home Affairs and Others (Ref: HH 2950/08)
Prohibition on police for arbitrary disruption of political rallies
ZLHR: *"the opposition party wrote a letter to the police to notify them of their run-off campaign rallies to be conducted on 8 June 2008 in Glen Norah, Mufakose, Kambuzuma and Chitungwiza. The police arbitrarily prohibited the rallies. The main reason for the prohibition was the pending investigations to threats of assassinating the MDC leadership and as experts in security the police further advised the MDC that rallies would increase the risk of the assassination. The court allowed the rallies as scheduled and dismissed the arguments of the police. Cognisant of the conduct of the police of disrupting rallies, High Court judge, Justice Chitakunye further held that the police were prohibited from disrupting the rally."*[397]

Case focus: MDC v Ministers of Home Affairs and Others (Ref: HH 2828/08); MDC v Minister of Home Affairs and Others (Ref: 3125/08); and ZCTU v Minister of Home Affairs and Others (Ref: HH 2477/08)
Prohibition of rallies on grounds of lack of police manpower
ZLHR: *"When notice has been given police have prohibited rallies or gatherings on spurious grounds such as lack of manpower. This was the case in MDC v Ministers of Home Affairs and Others (Ref: HH 2828/08); MDC v Minister of Home Affairs and Others (Ref: 3125/08); and ZCTU v Minister of Home Affairs and Others (Ref: HH 2477/08). Notification about pending gatherings was duly sent to the police. In response the police indicated, that they did not have enough manpower. The court indicated that the applicants could proceed and provide their own security in the form of marshals."*[398]

Case focus: Biti and Another v Minister of Home Affairs and Another (34/2002) [2002] ZWSC 9; SC9/02 (28 February 2002)[399]
Requirement for written notice of public gathering
The first applicant Biti as a member of the MDC, acting in terms of s 24(1) of the Public Order and Security Act ("POSA"), notified the Chief Superintendent that the MDC would be holding 12 public meetings. The

[395] "*POSA and the Right to Freedom of Assembly, Submissions by Zimbabwe Lawyers for Human Rights to the Parliamentary Portfolio Committee on Home Affairs and Defence*", (22 February 2010).
[396] Ibid.
[397] Ibid.
[398] Ibid.
[399] *Biti and Another v Minister of Home Affairs and Another* (34/2002) [2002] ZWSC 9; SC9/02 (28 February 2002), http://www.saflii.org/zw/cases/ZWSC/2002/9.html.

applicant was informed that only 4 of the 12 meetings could be held for various reasons under s 24. The applicant alleged that s 24 infringed their rights of freedom of assembly.

As the ZWSC explained, the applicants had to show that the Court should not accept that s 24 of the Act is reasonably justifiable in a democratic society on the grounds of public safety or public order.

ZWSC referred to the case of *In Re Munhumeso* and indicated that freedom of assembly is of great importance and must never be underestimated this right lies at the foundation of any democratic society. The court however held that the requirement to give notice was critical in ensuring that the regulating authority has a reasonable opportunity of anticipating or preventing any public disorder or any breach of the peace and ensuring that the gathering concerned does not unduly interfere with the rights of other people or lead to an obstruction of traffic, a breach of the peace or public disorder.[400]

The ZWSC accordingly held that s 24 does not arbitrarily or excessively invade the freedom of assembly as it "…merely requires the organiser of the public gathering to give written notice to the regulating authority. Most importantly, it does not give the regulating authority the power to prohibit the gathering or to order the persons taking part in the gathering to disperse."

10.11 Digital World

During the Arab Spring internet and mobile technologies, particularly social networks such as Facebook and Twitter, played an important new and unique role in organising and spreading the protests and making them visible to the rest of the world. An activist in Egypt tweeted, "*we use Facebook to schedule the protests, Twitter to coordinate, and YouTube to tell the world*".[401]

These successful uses of digital media in turn lead to increased censorship including the complete loss of Internet access for periods of time in Egypt and Libya in 2011.[402] In Syria, the Syrian Electronic Army (SEA), an organisation that operates with at least tacit support of the government, claims responsibility for defacing or otherwise compromising scores of websites that it contends spread news hostile to the Syrian regime.[403] SEA disseminates denial of service (DoS) software designed to target media websites including those of Al Jazeera, BBC News, Syrian satellite broadcaster Orient TV, and Dubai-based al-Arabia TV.[404] Digital media has not only caused a cascade of civil disobedience to spread among populations living under the most unflappable dictators, it has made for unique new means of civil organisation.

11 Freedom of Association

Freedom of association constitutes a *sine qua non* for the establishment and maintenance of a democratic society. It has been described as the 'bedrock of democracy' in which civil society finds its roots, and as a tool for groups and individuals to seek change and to address violations of human rights.[405]

Associating and uniting with others protects individuals from the vulnerability of isolation, and it enables those who would otherwise be ineffective to meet on more equal terms the power and

[400] Zimbabwe Lawyers for Human Rights, *Zimbabwe's Status of Compliance with Human Rights Instruments*, p. 192.
[401] Howard, Philip N, "*The Arab Spring's Cascading Effects*", Miller-McCune, 23 February 2011; http://www.miller-mccune.com/politics/the-cascading-effects-of-the-arab-spring-28575/.
[402] Cowie, James, "*Egypt Leaves the Internet*", Renesys, from the original on 2011-01-28; http://www.renesys.com/blog/2011/01/egypt-leaves-the-internet.shtml.
[403] *"Syrian Electronic Army: Disruptive Attacks and Hyped Targets*", OpenNet Initative, 25 June 2011; http://opennet.net/syrian-electronic-army-disruptive-attacks-and-hyped-targets.
[404] Ibid.
[405] Report of the Rapporteur, Office for Democratic Institutions and Human Rights, *Extracts from the Consolidated Summary of the 2004 OSCE Human Dimension Implementation Meeting* (2004).

strength of those with whom their interests interact and, perhaps, conflict.[406] The formation of political parties and participation in them, in particular, is vital to the democratic process. Equally important in this regard is the ability for organisations and pressure groups to exist and operate effectively in order to maintain a strong dialogue with those in power.

Freedom of association has a close connection with freedom of expression. The inability to exercise one may seriously affect the extent to which the other is granted. In order for people to develop opinions and communicate ideas effectively, they must be able to come together and associate with others. The freedom of thought and opinion and the freedom of expression will be significantly curtailed if they are not accompanied by an ability to share one's convictions and ideas with others, particular those who share the same ones.[407] In addition, the ability to develop opinions and express them freely constitutes a central objective of the right of association. The ACmHPR has identified, '*this amalgamation of the two norms is even clearer in the case of political parties, considering their essential role for the maintenance of pluralism and the proper functioning of democracy*'.[408]

Article 20 UDHR

1. Everyone has the right to freedom of...association".

2. No one may be compelled to belong to an association.

Article 22 ICCPR

1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.

2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

Article 10 African Charter

1. Every individual shall have the right to free association provided that he abides by the law.

2. Subject to the obligation of solidarity provided for in 29 no one may be compelled to join an association.

SADC Principles and Guidelines Governing Democratic Elections

SADC Member States shall adhere to the following principles in the conduct of democratic elections: (2.1.2) Freedom of association.

The SADC Norms and Standards for Elections in the SADC Region state:

[406] Jayawickrama, N, *The Judicial Application of Human Rights Law* (CUP), p. 739.
[407] See *Chassagnou v France*, European Court (1999) 29 EHRR 615.
[408] *Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'Homme/Mauritania*, para 80.

The sanctity of the freedom of association…should be protected and strictly adhered to. Relevant electoral laws and code of conduct should provide for this sanctity.

The right to freedom of association is also provided for under Article 5 (d)(ix) of the CERD and similarly protected under Article 11 ECHR and Article 16 ACHR.

11.1 Core principles of interpretation

The right to association clearly encompasses the right to form and participate in political organisations. It includes the freedom to choose who may be part of the association, and the freedom not to be forced to join an association.

Any restriction must be necessary in a democratic society (in accordance with the specific interests stipulated in the provision) and must not be arbitrary but authorised by law. A restriction must be proportionate (i.e. it must entail the use of the least restrictive means that are employable for the protection of the public interest relied upon).

11.2 The Scope of the Freedom of Association

The right of free association is an **individual** right and not a group right (despite the fact that an individual may combine to form a group in exercising it). It is to be enjoyed by 'everyone' according to Article 22 ICCPR or 'every individual' as set out by Article 10 ACHPR. The term 'association' has an **autonomous** meaning.

The right encompasses the right to form and participate in political organisations. It may also encompass NGOs and pressure groups.

Case focus: Amnesty International v Zambia, ACHPR 1998
Politically motivated deportation and denial of freedom of association
The complainants were prominent political figures in UNIP, a political party in Zambia which had been in power since independence, and had lived in Zambia for a number of decades. In 1991, UNIP was defeated by MMD in the multi-party election. The complainants were both served with deportation orders by the newly incumbent government, and deported to Malawi on the purported grounds that they were a threat to peace and security.

The ACmHPR held, *inter alia*, that the deportation constituted a violation of Article 10 ACHPR. It found that the deportations were politically motivated. In deporting the complainants, the government had denied them the exercise of their right to freedom of association since they were prevented from associating with their colleagues in UNIP and participating in their activities.

Case focus: Hurilaws v Nigeria, ACHPR 1998
Civil society and freedom of association
The human rights NGO alleged that it was subjected to harassment and persecution by the Nigerian government over a period of time. Its key members and staff were periodically arrested and detained and its offices were subjected to raids and searches carried out without warrant.

The ACmHPR held that these acts amounted to a violation of Article 10(1) of the ACHPR. In reaching to this conclusion the ACmHPR recalled the observations in its *Resolution on the Right to Freedom of Association*:

"1. The competent authorities should not override constitutional provisions or undermine fundamental rights guaranteed by the constitution and international standard;

2. In regulating the use of this right, the competent authorities should not enact provisions which would limit the exercise of this freedom;

3. The regulation of the exercise of the right to freedom of association should be consistent with State's obligations under the African Charter on Human and Peoples' Rights."

A State may not remove an association from the scope of the right by classifying it as 'public' or 'para-administrative'.[409]

The right to form an association may not be conditioned by a law that requires governmental recognition of that association.[410] Whilst a State is entitled to satisfy itself that an association's objectives and activities are in conformity with legislative rules, it must do so in a manner that complies with its obligations to secure to everyone the right to freedom of association.[411]

Case focus: *Zvozskov v. Belarus*, Comm. 1039/2001, U.N. Doc. A/62/40, Vol. II, at 11 (HRC 2006)
Civil society and rejection of application for registration of association; freedom of association
The human rights NGO was established to help with the implementation of the U.N. Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (the Declaration) in Belarus. An application was made to the Ministry of Justice for registration of the association. This application was rejected on the grounds that:
(1) one of the organisation's stated activities was to represent and to defend the rights of third persons, which was allegedly contrary to the relevant domestic law and regulation;
(2) doubts existed as to the validity of the association's creation, since there were 114 individuals listed in the minutes of the constituent assembly but fewer had actually voted.

The HRC considered that the facts disclosed a violation of Article 22(1) ICCPR. It reiterated that any restriction on the right to freedom of association must be provided by law, may only be imposed for one of the purposes set out in paragraph 2, and must be "necessary in a democratic society" for achieving one of these purposes. According to the HRC, "*[t]he reference to "democratic society" in the context of Article 22 indicates...that the existence and operation of associations, including those which peacefully promote ideas not necessarily favourably viewed by the government or the majority of the population, is a cornerstone of a democratic society*".

In the present case the HRC considered that *"[t]he State party has not advanced any argument as to why it would be necessary, for purposes of Article 22, paragraph 2, to condition the registration of an association on a limitation of the scope of its activities to the exclusive representation and defence of the rights of its own members. Taking into account the consequences of the refusal of registration, i.e. the unlawfulness of operation of unregistered associations on the State party's territory, the Committee concludes that the refusal of registration does not meet the requirements of Article 22, paragraph 2."*

The freedom implies both the right to **commence** an association and the right to **continue** that association. The freedom does not encompass a "*freedom to pursue the objectives for which the association exists"* i.e. the right to form an association does not guarantee the fulfilment of every aim of the association.[412]

A political party is not excluded from the protection afforded by this right merely because its activities are regarded by the authorities as undermining the constitutional structures of the State.

Persons forming an association have the right to associate with only those whom they voluntarily admit in the association, including members of government.

[409] *Chassagnou v France*, European Court (1999) 29 EHRR 615.
[410] *Ghosh v Joseph*, Supreme Court of India [1963] Supp. 1 SCR 789.
[411] See also *Sidiropoulos and Others v. Greece*, ECtHR (1998) 27 EHRR 633.
[412] *Attorney General v Alli*, Court of Appeal of Guyana [1989] LRC (Const) 474.

Case focus: *101/93: Civil Liberties Organisation (in respect of the Nigerian Bar Association)/Nigeria National bar association and freedom of citizens to join without State interference*
A governmental decree established a governing body of the national Bar association. The new body was made up of 31 nominees of the Bar association and 97 nominees of the government and was responsible for prescribing practising fees and disciplining legal practitioners. The decree also prohibited legal proceedings from being commenced or maintained in connection with the exercise of powers by the body.

The ACmHPR held that the establishment of the governing body constituted a violation of Article10 ACHPR. The body was dominated by representatives of the government and had wide discretionary powers. Furthermore, the interference was inconsistent with the preamble of the ACHPR in conjunction with the *UN Basic Principles on the Independence of the Judiciary*. In coming to its conclusion, the Commission emphasised that *"[f]reedom of association is enunciated as an individual right and is first and foremost a duty for the State to abstain from interfering with the free formation of associations. There must always be a general capacity for citizens to join, without State interference, in associations in order to attain various ends."*

The right also includes the freedom not to associate:[413]

* An individual may not be compelled to belong to an association;
* In particular, the compulsion to join a ruling party in order to have any real opportunity of advancement is "*a hallmark of a totalitarian state*", depriving the individual of the freedom to associate with other groups whose values he or she might prefer and;[414]
* The freedom will be infringed if, in reality, the choice which remains is either non-existent or reduced to such an extent that it is of no practical value.[415]

In addition to its negative duty to refrain from interfering with the freedom, the State may, in certain circumstances, be obliged to intervene in the relationships between private individuals by taking reasonable and appropriate measures to secure the effective enjoyment of the right.[416]

11.3 Restrictions on the Freedom of Association

Article 22 ICCPR permits the same categories of limitations as Articles 19 and 21 and the same procedural safeguards, namely that any restriction be prescribed by law, necessary in a democratic society for the protection of public interests. Similarly, the scope of Article 22 is limited by Article 5, in other words the provision cannot be interpreted in such a way as to include any activity which infringes upon the rights of others cited in the ICCPR.

11.3.1 Necessary in a democratic society and in accordance with a legitimate aim

Any restriction must be necessary in a democratic society and in accordance with a legitimate aim. A fundamental characteristic of democracy is the possibility it offers of resolving a country's problems through dialogue. Democracy requires diverse political ideas to be proposed and debated, even if they question the very way in which the State is organised, provided that they do not harm

[413] It should be noted that, whilst the proposal to add the sentence "No one may be compelled to join an association" to Article 22 of the ICCPR was not accepted, it was recognised that this sentence stressed an important aspect of the freedom of association. The reason for its ultimate exclusion was due to a very specific concern that its application might not always be in the interest of trade unions: UN ocument A/2929, Chapter VI, section 145. Similar concerns about the functioning of trade unions were expressed in the Third Committee, where several delegations stressed the need to ensure that no one is compelled to join an organisation, particularly political parties, against their will: UN document A/5000, sections 64 and 69.
[414] *Lavigne v. Ontairo Public Service Employees Union*, Supreme Court of Canada (1991) 126 NR 161 (per Mclachlin J).
[415] *Chassagnou v. France*, European Court (1999) 29 EHRR 615.
[416] For example, during the drafting stage of Article 22 of the ICCPR, the Commission on Human Rights rejected a proposal that the freedom of association should be protected only against governmental interference (UN document A/2929, chapter VI, s.148).

democracy itself. Where political parties are concerned, the legitimate aims are to be construed strictly.[417]

Case focus: *28/99: Law Offices of Ghazi Suleiman / Sudan*
Freedom of movement to deliver public lecture; freedom of association and assembly
A partner of a law firm was invited by a group of human rights defenders to deliver a public lecture in Sinnar. He was allegedly prohibited from travelling to Sinnar by security officials who threatened that he would be arrested if he made the trip. This threat and the implied threat of repercussions for the group meant that he did not embark on the trip.

The ACmHPR held, *inter alia*, that there had been a violation of Articles 10 and 11 of the ACHPR. By preventing him from gathering with others to discuss human rights and by punishing him for doing so, the respondent State had violated his human rights to freedom of association and assembly. At paragraph 65, the Commission emphasised that: *"[t]he fact that Mr Ghazi Suleiman advocates peaceful means of action and his advocacy has never caused civil unrest is additional evidence that the complained about actions of the Respondent State were not proportionate and necessary to the achievement of any legitimate goal. Furthermore, the actions of the government of Sudan not only prevent Mr Ghazi Suleiman from exercising his human rights, but these actions have a seriously discouraging effect on others who might also contribute to promoting and protecting human rights in Sudan."*

Only convincing and compelling reasons can justify restrictions on a political party's freedom of association.

Case focus: *Mr. Jeong-Eun Lee v. Republic of Korea,* Comm. 1119/2002, U.N. Doc., CCPR/C/84/D/1119/2002 (2005)
Freedom of assembly and association; valid restrictions
The author of the communication had been elected vice-president of his university's student council. Such a position meant that he automatically became a member of the Convention of Representatives, the highest decision-making body of the Korean Federation of Student Councils. The Federation was an organisation that pursued the objectives of democratisation of Korean society, national reunification and advocacy of campus autonomy. In 1997, however, the Supreme Court ruled that the Federation was an "enemy-benefiting group" and an anti-State organisation within the meaning of the National Security Law, because it purportedly supported the strategy of the Democratic People's Republic of Korea (DPRK) to achieve national unification by "communizing" the Republic of Korea. In 2001, the author became a member of the Convention of Representatives in the ninth year of the Federation. He was subsequently arrested, indicted and sentenced to imprisonment.

The HRC was of the view that that the facts disclosed a violation of Article 22 ICCPR. The HRC outlined the applicable principles:
"The Committee observes that, in accordance with Article22, paragraph 2, any restriction on the right to freedom of association to be valid must cumulatively meet the following conditions:
(a) it must be provided by law;
(b) it may only be imposed for one of the purposes set out in paragraph 2; and
(c) it must be "necessary in a democratic society" for achieving one of these purposes. The reference to a "democratic society" indicates, in the Committee's view, that the existence and functioning of a plurality of associations, including those which peacefully promote ideas not favourably received by the government or the majority of the population, is one of the foundations of a democratic society.

Therefore, the existence of any reasonable and objective justification for limiting the freedom of association is not sufficient. The State party must further demonstrate that the prohibition of the

[417] For example, the African Commission has stressed that any restriction must be "absolutely necessary for the benefits to be realised" (*Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'Homme / Mauritania*, paragraph 78*)* See also: *United Communist Partv Turkey*, European Court of Human Rights (1998) EHRR 121.

association and the criminal prosecution of individuals for membership in such organizations are in fact necessary to avert a real, and not only hypothetical danger to the national security or democratic order and that less intrusive measures would be insufficient to achieve this purpose".

Applied to the facts, the Committee considered that the State party had not shown that the author's conviction was necessary to protect national security or any other purpose set out in Article 22(2). In particular, it had failed to specify the precise nature of the threat allegedly posed by the author's membership and had failed to show that punishing the author for his membership was necessary to avert the alleged danger.

Where the restriction is likely to have serious consequences for a political association or human rights organisation, its purported justification must be particularly compelling.

Case focus: *Korneenko v. Belarus*, Comm. 1274/2004, U.N. Doc. A/62/40, Vol. II, at 157 (HRC 2006)
Freedom of association and to carry out its statutory duties and to engage in political activities
On 17 June 2003, a regional court ordered the dissolution of the regional association "Civil Initiatives" on the grounds that it had violated the domestic law due to: (1) improper use of equipment, received through foreign grants, for the production of propaganda materials and the conduct of propaganda activities; and (2) deficiencies in the association's documentation.

The HRC considered that this amounted to a violation of Article 22 ICCPR. It emphasised that *"the right to freedom of association relates not only to the right to form an association, but also guarantees the right of such an association freely to carry out its statutory activities. The protection afforded by Article 22 extends to all activities of an association*."

In light of the serious consequences which arose for the association in the instant case, the dissolution amounted to a restriction of the right to freedom of association. As regards whether this interference was justified, the State party had not advanced any argument as to why it would be necessary, for purposes of Article 22(2), to prohibit the association's use 'for the preparation of gatherings, meetings, street processions, demonstrations, pickets, strikes, production and the dissemination of propaganda materials, as well as the organisation of seminars and other forms of propaganda activities'. The State party had also failed to advance arguments as to which of the deficiencies in the association's documentation triggered the application of the restrictions spelled out in Article 22(2). Even assuming that the requirements complied with domestic law, the dissolution was therefore disproportionate.

11.3.2 Not arbitrary and authorised by law

A restriction must not be arbitrary and must be authorised by the law.

Case focus : 54/91-61/91-98/93-164/97_196/97-210/98: Malawi Africa Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme/Mauritania
Freedom of association, political meetings, and discrimination
Following a coup d'état in 1984, the incumbent government was criticised by various ethnic groups for marginalising Black Mauritanians. A manifesto was distributed which provided evidence of the racial discrimination to which Black Mauritanians were subjected and demanded the opening of a dialogue with the government. A number of individuals were arrested in connection with this document and a series of trials took place. In one of the cases, charges were brought against 15 individuals for belonging to a secret movement, holding unauthorised meetings and distributing tracts. Three of the accused in this case were found guilty and given suspended sentences. In a separate case, 17 individuals who were presumed to be members of the Ba'ath Arab Socialist Party were arrested and charged with belonging to a criminal association, participating in unauthorised meetings and abduction of children. Seven of the accused were found guilty and sentenced to a seven-month suspended term of imprisonment.

The ACmHPR held, *inter alia*, that there had been a violation of Article 10(1) ACHPR. It noted that some of the presumed supporters of the Ba'ath Arab Socialist Party were imprisoned for belonging to a criminal

association, and that the defendants in the manifesto case were charged with belonging to a secret movement. However, the Commission highlighted that the government did not provide any argument which established the criminal nature or character of these groups. It stressed the view that *"any law on associations should include an objective description that makes it possible to determine the criminal nature of a fact or organisation". In the instant case, none of these "simply rational requirements"* was met.

11.3.3 Any restriction must be proportionate

It must entail the use of the least restrictive means that are employable for the protection of the public interest relied upon.

Case focus: Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'Homme/Mauritania

State dissolution of opposition party; proportionality of restriction of freedom

The Prime Minister of the Islamic Republic of Mauritania issued a decree which dissolved the Union des forces démocratiques/Ere nouvelle (UFD/EN), the main opposition party in Mauritania. This decree was allegedly imposed following a series of actions and undertakings committed by the leaders of UFD/EN which: (1) were damaging to the good image and interests of the country; (2) incited Mauritanians to violence and intolerance; and (3) led to demonstrations which compromised public order, peace and security. The political organisation's assets were subsequently seized. Furthermore, several of the party's leaders who had participated in a demonstrated against the measure were arrested for breach of public order.

The ACmHPR held that the dissolution decree was not proportionate to the nature of the breaches and offences committed by UFD/EN and was therefore in violation of the provisions of Article 10(1) ACHPR. Although states have the right to regulate the exercise of the rights to freedom of association and association through national legislation, such regulations should be compatible with the obligations of states as outlined in the ACHPR. The remainder of the ACmHPR's decision is worth citing in full since it constitutes the ACmHPR's most thorough analysis on Article 10(1):

81. In this particular case it is obvious that the dissolution of the UFD/EN had the main objective of preventing the party leaders from continuing to be responsible for actions for declarations or for the adoption of positions which, according to the Mauritanian government, caused public disorder and seriously threatened the credit, social cohesion and public order in the country.
82. Nonetheless, and without wanting to pre-empt the judgment of the Mauritanian authorities, it appears to the African Commission that the said authorities had a whole gamut of sanctions which they could have used without having to resort to the dissolution of this party. It would appear in fact that that if the Respondent State wished to end the verbal "drifting" of the UFD/EN party and to avoid the repetition by this same party of its behaviour prohibited by the law, the Respondent State could have used a large number of measures enabling it, since the first escapade of this political party, to contain this "grave threat to public order".
83. The Decree No. 91-024 had in effect, made provision for other sanctions in order to deal with "slips" of political parties. Furthermore, the African Commission finds that the dissolution of UFD/EN was in conformity with the provisions of the Decree relating to the political parties.
[...]
85. The African Commission notes that the Respondent State contends rightly that the attitudes or declarations of the leaders of the dissolved party could indeed have violated the rights of individuals, the collective security of the Mauritanians and the common interest, but the disputed dissolution measure was "not strictly proportional" to the nature of the breaches and offences committed by the UFD/EN."

Any restriction must not render the right illusory. The ACmHPR emphasised in the Interights case that "*the law in question should be in conformity with the obligations to which the State has subscribed in ratifying the African Charter and should not "render the right itself an illusion*".[418]

11.4 Domestic Provisions and Cases

Section 21 Constitution of Zimbabwe

21. Protection of freedom of assembly and association

1. Except with his own consent or by way of parental discipline, no person shall be hindered in his freedom of assembly and association, that is to say, his right to assemble freely and associate with other persons and in particular to form or belong to political parties or trade unions or other associations for the protection of his interests.

2. The freedom referred to in subsection (1) shall include the right not to be compelled to belong to an association.

3. Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) to the extent that the law in question makes provision—

a) in the interests of defence, public safety, public order, public morality or public health;
b) for the purpose of protecting the rights or freedom of other persons;
c) for the registration of companies, partnerships, societies or other associations of persons, other than political parties, trade unions or employers' organisations; or
d) that imposes restrictions upon public officers;

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society.

4. The provisions of subsection (1) shall not be held to confer on any person a right to exercise his freedom of assembly or association in or on any road, street, lane, path, pavement, side-walk, thoroughfare or similar place which exists for the free passage of persons or vehicles. [419]

Commenting on this provision and Article 20 on freedom of expression,[420] the Supreme Court of Zimbabwe emphasised that "*the importance attaching to the exercise of the right to freedom of expression and assembly must never be underestimated. They lie at the foundation of a democratic society and are one of the basic conditions for its progress and for the development of every man*."[421]

[418] *Interights, Institute for Human Rights and Development in Africa, and Association mauritanienne des droits de l'Homme/Mauritania*, paragraph 79.
[419] The Constitution of Zimbabwe (As amended on 1st February 2007).
[420] 1994 (1) ZRL 49 (S).
[421] Ibid, p. 56.

This provision appears to suggest a strong protection of freedom of political association in Zimbabwe. In practice, however, Zimbabwe is not the most welcoming country of "*multi-partyism*" in Africa.[422]

The **Lancaster House Constitution 1979** entrenched the right to political association for at least ten years after Zimbabwe's independence. Nevertheless, the de facto establishment of a one-party State has been achieved through a number of measures. Intimidation, arrest, detention and orchestrated violence against members and supporters of opposition parties have characterised previous general elections and combined with the use of public resources and funds to finance political activities, threatens the full enjoyment of the freedom of association in Zimbabwe.

The following case is illustrative of issues which have arisen in Zimbabwe.

Case focus: Movement for Democratic Change v Timothy Mubhawu, High Court of Zimbabwe
The applicant was a political party which had fielded hundreds of candidates in the forthcoming harmonised Presidential, Senatorial, Parliamentary and Council elections. The respondent had been a Member of the House of Assembly for one of its constituencies but he had had failed to garner the support of the party to continue standing as its official candidate. The applicant notified the Electoral Commission of its intention to substitute the respondent with a different candidate. The respondent sought to act as an independent, conducting his campaign using the materials and posters of the political party. The applicant sought to interdict the respondent from doing so.

The application was dismissed. Particularly notable was Hungwe J's remarks about the right to freedom of assembly and association: *"Section 21 of the Constitution guarantees a private citizen's freedom of association and assembly. This right, like any other right, is subject to lawful limitations which place a duty upon such citizen not to act in a manner that infringes other citizen's rights. Section 21 of the Constitution of Zimbabwe accords with Article13 of the African Charter on Human and Peoples' Rights and the general tenor of Article 22 of the ICCPR. Further, the likely prejudice which a political party suffers in such circumstances as obtain in the present case is far outweighed by the need to protect and promote the right in question. It is a right that supersedes any prejudice the applicant may lawfully lay claim to."*

11.5 Human Rights Committee Interpretation

Critical to an understanding of the freedom of association in regards to the electoral process is the interpretation offered by the HRC which extends particular individual electoral rights, to associations and political parties.[423] In relation to Syria the HRC has expressed the following concern,

> *"at the absence of specific legislation on political parties [in the Syrian Arab Republic] and at the fact that only political parties wishing to participate in the political activities of the National Progressive Front, led by the Baath Party, are allowed. The Committee [was] also concerned at the restrictions that can be placed on the establishment of private associations and institutions ... including independent non-governmental organizations and human rights organizations. [Hence,] the State party should ensure that the proposed law on political parties is compatible with the provisions of the Covenant. It should also ensure that the implementation of the Private Associations and Institutions Act No. 93 of 1958 is in full conformity with Articles 22 and 25 of the Covenant."*

The HRC has also expressed concern at difficulties in Belarus arising from *"the registration procedures to which non-governmental organizations and trade unions are subjected".* The HRC expressed concern about reported cases of intimidation and harassment of human rights activists by the authorities, including their arrest and the closure of the offices of certain non-governmental

[422] Samnoy, A, '*Zimbabwe*' in Andreassen, B, & Swineheart, T, *Human Rights in Developing Countries Yearbook 1991* (Scandinavian University Press, 1992), pp. 378-424, 386.
[423] UNHRC, *General Comment 31*, para 9.

organizations. In this regard the HRC, reiterating that the free functioning of non-governmental organizations is essential for the protection of human rights and dissemination of information in regard to human rights among the people, recommended that laws, regulations and administrative practices relating to their registration and activities be reviewed without delay in order that their establishment and free operation may be facilitated in accordance with Article 22.

12 Independent Judiciary

Implementation of pre-requisite rights crucially depends upon the protection of the rule of law by a fully independent and impartial, functioning judiciary. The judiciary is the principal national body charged with the protection of the rule of law not just between election periods but during elections as well. The principles of independence and impartiality encapsulate both the requirement of actual independence and impartiality and the necessity to be perceived as such. Whether the judiciary is reasonably perceived as being independent and impartial is crucial to its capacity to properly administer justice in any given case and for the wider need for maintaining public confidence in the rule of law. The right to be heard by an independent and impartial judiciary is enshrined in all major international legal instruments:[424]

Article 10 of the UDHR

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 14(1) of the ICCPR

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

Part of every individual's right to have his cause heard is "*the right to be tried within a reasonable time by an impartial court or tribunal*" (Article 7(1) ACHPR). Every State party to the ACHPR is under a duty "*to guarantee the independence of the courts*" (Article 26). The independence and authority of the judiciary are crucial for the effective functioning of a democratic state.

> *"The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society [...] for maintaining the authority and impartiality of the judiciary."*[425]

Fundamental principles which underpin an independent and impartial judiciary include:

* Judicial independence must be guaranteed in the Constitution or other laws of the country;
* Judicial impartiality must be guaranteed without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect;

[424] The American Declaration of the Rights and Duties of Man (ADRD) is the only international text that does not expressly refer to the term 'independence', however, the meaning and scope of Art. 26(2) ADRD is arguably the same, providing for the right to be given an "*impartial and public hearing and to be tried by courts previously established in accordance with pre-existing laws*".

[425] CoE, *Convention for the Protection of Human Rights and Fundamental Freedoms*, Art. 10(2).

* The judiciary must have exclusive authority to determine competence to adjudicate;
* Judicial decisions shall not be subject to revision. This principle should be without prejudice to judicial review of lower court decisions and mitigation or commutation by competent authorities of sentences imposed by the judiciary in accordance with the law;
* The judiciary must be entitled and required to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected;
* States are required to provide adequate resources to enable proper functioning of the judiciary.[426]

12.1 Interpretation

12.1.1 Judicial Independence

Judicial independence refers to independence from the executive and legislature and political parties.[427] It also includes any other person with State authority who may use this to exert influence, e.g. a person or body within the judiciary itself with power to exert authority over other judges.[428]

The right is composed of two interrelated but distinct aspects, the state of mind or attitude in the exercise of judicial functions (individual independence) and the relationship to others including the executive which rests on objective conditions and guarantees (institutional independence).[429]

The appearance of independence, the manner in which members of the judiciary are appointed and their terms of office, and the existence of guarantees against external pressure are of equal importance as the reality.[430]

Security of tenure is essential and any removal of a judge from the bench must be strictly in accordance with the constitutionally established principles and procedure.[431] Also essential to it are financial security and institutional independence as regards to administrative matters relating directly to adjudicative functions, e.g. arrangement of court lists, assignment of judges to cases, etc.[432]

States are required to take specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence in their decision-making through the constitution or adoption of laws establishing clear procedures and objective criteria for the appointment, remuneration, tenure, promotion, suspension and dismissal of the members of the judiciary and disciplinary sanctions taken against them.[433] Judges may be dismissed only on serious grounds of misconduct or incompetence, in accordance with fair procedures ensuring objectivity and impartiality set out in the constitution or the law. The dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is

[426] See the *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August-6 September 1985: report prepared by the Secretariat (United Nations publications, Sales No. E.86.IV.1), chap. I, sect. D.2. The Basic Principles were endorsed by the General Assembly in resolutions 40/32 and 40/146 of 29 November and 13 December 1985, respectively.
[427] UN Document A/2929, Chapter VI, section 77.
[428] *R v Lippe* [1991] 2 SCR 114, The Supreme Court of Canada.
[429] *Valente v The Queen* [1985] 2 SCR 673, The Supreme Court of Canada.
[430] *Bryan v The United Kingdom* (1995) 21 EHRR 342, European Court of Human Rights.
[431] Report No.103/1997 (Argentina), Inter-American Commission, paragraph 41.
[432] *Valente v The Queen* [1985] 2 SCR 673, The Supreme Court of Canada.
[433] *Concluding observations, Slovakia*, CCPR/C/79/Add.79 (1997), HRC, para 18; *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32 (2007), Human Rights Committee, adopted at its 90th session in 2007 (replacing General Comment No. 13).

incompatible with the independence of the judiciary.[434] Even where judges alleged to be corrupt are dismissed, this must be in adherence to the proper procedures as provided for by the law.[435]

The functions and competencies of the judiciary and the executive must be clearly distinguishable and demarcated.[436]

12.1.2 Judicial Impartiality

Judicial impartiality relates to the requirement that a person must not be a judge in their own cause. It includes subjective impartiality, in that there must not be any personal prejudice or bias (this is assumed without evidence to the contrary), and objective impartiality, in that there must be sufficient guarantees evident to exclude any legitimate doubt in this regard;[437]

In practice it means that automatic disqualification should occur from adjudication if the member has an actual interest in the litigation, whether as a party or in relation to the outcome (whether financial or proprietary). Disqualification from adjudication should also occur even where the member's interest in the subject-matter of the proceedings arises out of an association with a person or body involved in those proceedings or a strong commitment to some relevant cause or belief (where the judge's decision would lead to the promotion of such cause).[438]

Impartiality is measured against the test of '*whether a fair-minded lay observer might have reasonably apprehended that the judge did not bring an impartial and unprejudiced mind to the resolution of the question he was required to decide'*.[439]

The crucial element, where there is an apprehension or fear that a judge lacks impartiality, is whether such fear is objectively justifiable.[440]

Case focus: Communication 60/91: Constitutional Rights Project (in respect of Wahab Akamu, G. Adega and others)/Nigeria, African Commission on Human and People's Rights
The Commission found there was a violation of Article 7(1)(a) of the Charter in a communication brought on behalf of individuals sentenced to death by the Robbery and Firearms Tribunal, a special tribunal composed of a serving/retired judge, a member of the armed forces and a member of the police force and from which there was no judicial appeal of sentence, the only further 'appeal' being the confirmation or disallowance by the relevant State Governor. It noted that the issue concerned the fundamental right to life and liberty and considered that "*whilst punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of appeal to 'competent national organs' in criminal cases bearing such penalties clearly violates Article 7.1.a of the African Charter, and increases the risk that severe violations may go unredressed*". It made clear that the requirement of impartiality was not met; it considered irrelevant "*the character of the individual members of such tribunals [as] its composition alone creates the appearance, if not actual lack, of impartiality*".

[434] Communication No. 814/1998, *Pastukhov v. Belarus*, HRC, para 7.3*; General Comment No. 32*, U.N. Doc. CCPR/C/GC/32 (2007.
[435] Communication No. 933/2000, *Mundyo Busyo et al v. Democratic Republic of Congo,* HRC, para 5.2; *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32 (2007).
[436] Communication No. 468/1991, *Oló Bahamonde v. Equatorial Guinea*, HRC, para 9.4; *General Comment No. 32*, U.N. Doc. CCPR/C/GC/32 (2007), Human Rights Committee; *Concluding Observations, Romania*, CCPR/C/79/Add.111, para 10.
[437] *Gregory v United Kingdom* (1997) 25 EHRR 577, ECtHR.
[438] *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No.2)* [1999] 1 LRC 1, House of Lords, United Kingdom.
[439] *Johnson v Johnson* [2000] 5 LRC 223, High Court of Australia.
[440] *Castillo Algar v Spain* (1998) 30 EHRR 827, European Court of Human Rights.

13 States of Emergency

Emergency or exceptional legislation often imposes restrictions on fundamental rights otherwise impermissible. Those very rights which ensure free and fair elections may be restricted in such circumstances. Repeal or suspension of those laws for the period of the election campaign has to be considered in order for the elections to conform to international standards. In particular, any law which restricts ordinary enjoyment of free expression, information, assembly, association will be wholly inconsistent with the conduct of free and fair elections.

Legislation adopted in emergency situations nonetheless should clearly and carefully define the extent to which the constitutional order may be altered. A State of emergency should be declared only in conformity with the law and be authorized only in the event of a public emergency which threatens the life of the nation, where measures compatible with the Constitution and laws in force are plainly inadequate to address the situation.

- ☒ Relevant international standards further require that a State of emergency be officially proclaimed before any exceptional measures are put into place. Any such measures must be strictly required by the exigencies of the situation, and must not be inconsistent with other requirements under international law. Nor may such measures discriminate solely on the basis of race, colour, sex, language, religion, or social origin.

Derogations from certain rights are impermissible under international law, even in a State of officially declared emergency. These rights include:

* the right to life;
* the prohibition on torture and other cruel, inhuman and degrading treatment or punishment;
* the prohibition on slavery, the slave trade and practices similar to slavery; or the prohibition on imprisonment for failure to fulfill a contractual obligation.

Nor may anyone be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed. Nor may a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender must benefit from the lighter penalty.

Additionally, non-derogable rights include the right of everyone to be recognised as a person before the law and the right of everyone to freedom of thought, conscience and religion. Each of these principles should find expression in the highest law of the country.

The UN Special Rapporteur on Human Rights and States of Emergency has issued the following recommendations:

* an independent and fully functioning judiciary must be protected;
* nothing done pursuant to a State of emergency should diminish the jurisdiction of the courts to review the legality of the State of emergency or their jurisdiction over legal actions to protect any rights whose effectiveness is not affected by the declaration of emergency.
* Furthermore, existing national legislatures may not be dissolved during a State of emergency and all members of the legislature must enjoy the privileges and immunities necessary for the exercise of their mandates.

Also, according to the Special Rapporteur, when the State of emergency has ended, all possible efforts should be made to restore to those whose rights have been adversely affected by measures taken pursuant to the emergency full enjoyment of their rights, including the right to participate in the political process and compensation for injuries suffered.

No person should be subject to any form of discrimination by reason of his or her involvement in any activity or expression which was rendered illegal by the State of emergency. In addition, nothing done pursuant to the declaration of emergency should restrict the right of a person who considers that he or she has suffered a violation of a legally recognised right during the State of emergency to seek redress before the courts once the emergency has ceased. This includes the right to a prompt decision on his or her claim. In every case, States should be vigilant to ensure that no lingering negative effects on political participation survive the termination of the State of emergency.

14 Respect for Fundamental Human Rights

States are obligated to give effect to human rights.[441] This obligation to take the steps necessary to give effect to human rights applies to the entire electoral process and all electoral rights. Guarantees of free speech, opinion, information, assembly, movement and association take on a greater significance during elections. Laws in force which might have the effect of discouraging political participation should be repealed or suspended. Emergency or other exceptional legislation restricting fundamental rights should be repealed or suspended. Exceptional measures must not be imposed unless strictly required by the exigencies of the situation, and must not be calculated to corrupt or unnecessarily delay the political process.

[441] UN, ICCPR, Article 2; AU, African Charter, Article 1; OAS, ACHR, Article 2; CIS, Convention on Human Rights, Article 1; CoE, ECHR, Article 1

D. Human Rights Protection Mechanisms

15 United Nations Human Rights Protection Mechanisms

The international human rights movement was strengthened when the United Nations (UN) General Assembly adopted the **Universal Declaration of Human Rights** (UDHR) on 10 December 1948. Drafted as "a common standard of achievement for all peoples and nations", the UDHR spelt out, for the first time in human history, basic civil, political, economic, social and cultural rights that all human beings should enjoy. The UDHR has, over time, become widely accepted as a statement of the fundamental norms of human rights. Some of the provisions are part of customary international law, such as the prohibition of torture and racial discrimination.

The UDHR, together with the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, form the so-called **International Bill of Human Rights**. The ICESCR and ICCPR were both adopted by General Assembly resolution 2200 A (XXI) on 16 December 1966. Over time, the UN has gradually expanded human rights law to encompass specific standards for women, children, disabled persons, minorities, migrant workers and other vulnerable groups, who now possess rights that protect them from discriminatory practices common in many societies.

Although the UDHR is not a legally binding treaty, its importance should not be underestimated. It has been the most important and far-reaching of all United Nations declarations and a fundamental source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms. It has set the direction for all subsequent work in the field of human rights.

Many of the provisions of the UDHR are now widely accepted as forming part of customary international law. The UDHR sets out basic rights and freedoms to which all women and men are entitled, such as the right to life, liberty and nationality, the right to freedom of thought, conscience and religion, the right to work and to be educated, the right to food and housing, the right to participate in government and the right not to be discriminated against on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property birth or other status.

A series of international human rights treaties and other instruments adopted since 1945 have made human rights legally enforceable and developed the body of international human rights law. Other instruments have been adopted at the regional level, reflecting the particular human rights concerns of different regions and providing specific mechanisms of protection. Most States have also adopted constitutions and other laws which formally protect basic human rights. While international treaties

and customary law form the backbone of international human rights law, other instruments, such as declarations, guidelines and principles adopted at the international level, contribute to its understanding, implementation and development.

Respect for human rights requires the establishment of the rule of law at both the national and international level. Through the ratification of international human rights treaties, States undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints are available at the regional and international levels to help ensure that international human rights standards are respected, implemented, and enforced.

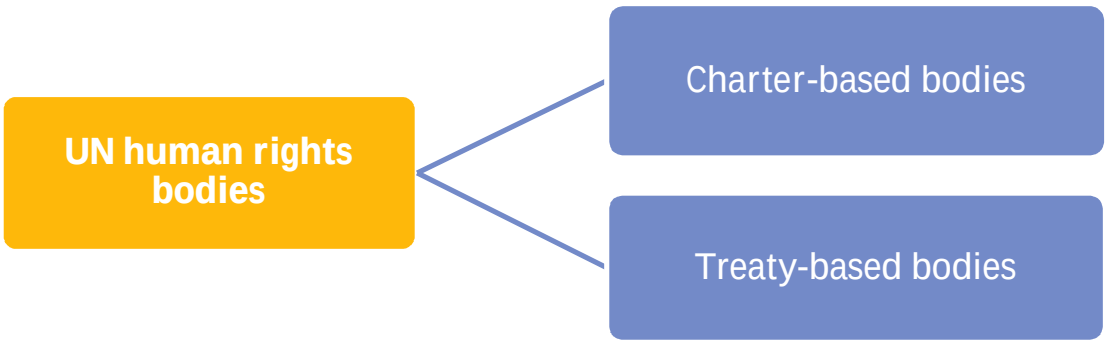
15.1 International human rights instruments

Through the efforts of the UN, governments have concluded many multilateral agreements that attempt to make the world a safer, healthier, more just and more equal place. The UN has developed a comprehensive body of international law, which includes human rights law. Human rights standards are set out in Covenants, Conventions, Charters and Protocols, which are legally binding on the States that agree to be bound by them.

Treaties can be ratified by States. The terms "ratification" and "accession" refer to the act of a State agreeing to be bound by a treaty. When a State ratifies a treaty it is given time to seek approval for the treaty at the domestic level and to enact legislation to give domestic effect to the treaty. States can enter reservations on treaties. This means that they can exclude or alter the legal effect of some of the treaty provisions. Reservations can be made when the treaty is signed, ratified, accepted, approved or acceded to, however they must not be incompatible with the object and purpose of the treaty.

15.2 Overview of UN human rights bodies

The United Nations system comprises the UN Charter-based bodies and the treaty-based bodies.



15.2.1 UN Charter-based bodies

The UN Charter-based bodies include the UN Human Rights Council, which is a successor of the UN Commission on Human Rights, and the special procedures of the Human Rights Council.

The **Human Rights Council** was established in 2006 by the UN General Assembly. It replaced the UN Commission on Human Rights, which was established in 1946, and it comprised 53 UN Member States elected by the UN Economic and Social Council. The Commission was criticised for allowing States perceived to be human rights violators to become members and for being ineffective.

The Human Rights Council is an inter-governmental body with 47 Member States. The Council is responsible for strengthening the promotion and protection of human rights around the globe. It is a subsidiary body of the General Assembly and its members are elected by the Member States of the General Assembly.

The mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address specific human rights issues around the world are called "special procedures". Special procedures consist of either an individual (a special rapporteur or representative, or independent expert) or a working group.

15.2.2 Treaty-based bodies

There are ten human rights treaty bodies that monitor States' implementation of the core international human rights treaties that they have ratified. The treaty bodies are created in accordance with the provisions of the treaty that they monitor and are supported by the OHCHR (see below). Treaty bodies are not judicial bodies; they monitor treaty implementation and provide encouragement and advice to States.

Treaty-based bodies:

* Committee on the Elimination of Racial Discrimination (CERD)
* Human Rights Committee (HRC)
* Committee on Economic, Social and Cultural Rights (CESCR)
* Committee on the Elimination of Discrimination against Women (CEDAW)
* Committee against Torture (CAT)
* Subcommittee on Prevention on Torture (SPT)
* Committee on the Rights of the Child (CRC)
* Committee on Migrant Workers (CMW)
* Committee on the Rights of Persons with Disabilities (CRPD)
* Committee on Enforced Disappearances (CED)

The committees are made up of independent experts. Nine of these treaty bodies monitor the implementation of the core international human rights treaties while the tenth treaty body - the Subcommittee on Prevention of Torture established under the Optional Protocol to the Convention against Torture - monitors places of detention in the States parties to the Optional Protocol.

15.2.3 The Office of the High Commissioner for Human Rights

The High Commissioner for Human Rights is the principal human rights official of the United Nations. The High Commissioner heads the Office of the High Commissioner for Human Rights (OHCHR) and spearheads the United Nations' human rights efforts. OHCHR is part of the United Nations Secretariat with its headquarters in Geneva. The OHCHR is distinct from the Human Rights Council.

The OHCHR offers expertise and support to the Human Rights Council, the special procedures and the treaty bodies. Most of these bodies receive secretariat support from the Human Rights Council and Treaties Division of the Office of the High Commissioner for Human Rights. As the principal UN office mandated to promote and protect human rights for all, OHCHR leads global human rights efforts and speaks out against human rights violations worldwide. The OHCHR provides a forum for identifying, highlighting and developing responses to today's human rights challenges, and acts as a focal point of human rights research, education, public information, and advocacy activities in the UN.

Since governments have the primary responsibility of protecting human rights, the OHCHR provides them with assistance, such as expertise and technical training in the areas of administration of justice, legislative reform, and electoral processes, so as to help implement international human rights standards on the ground. The OHCHR also assists other entities who are responsible for protecting human rights.

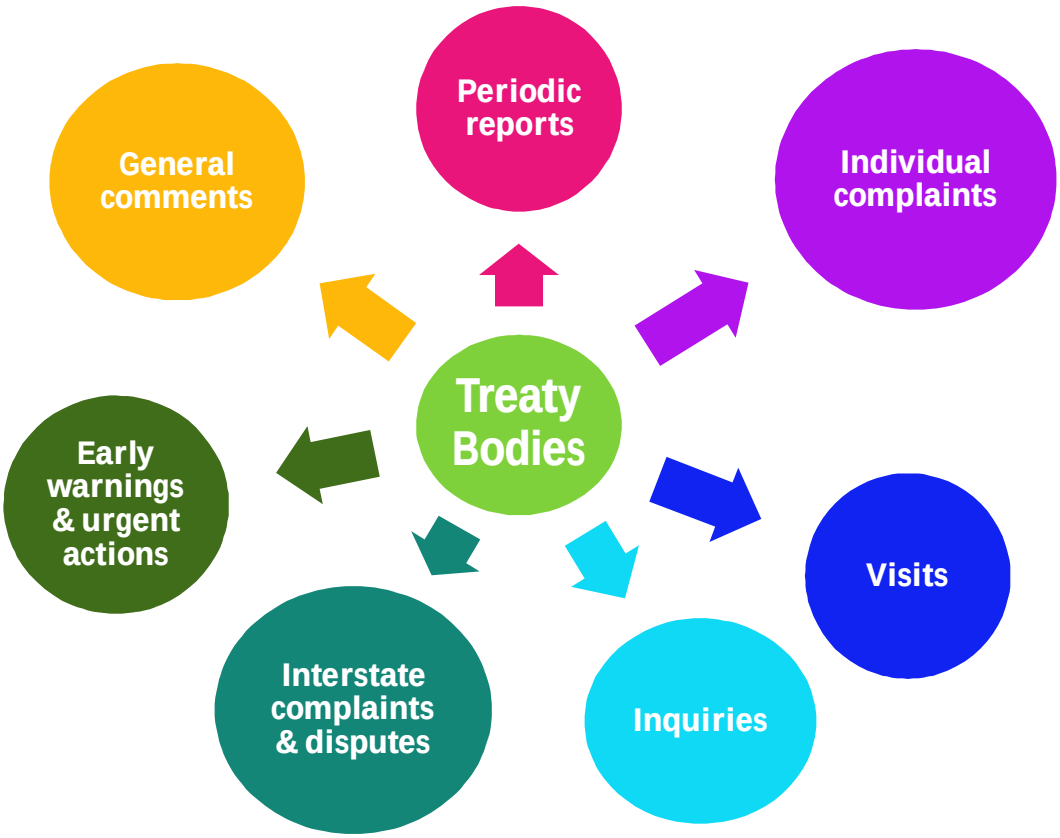
15.3 Core International Human Rights Treaties and Monitoring Treaty Bodies

15.3.1 The core international human rights treaties

There are nine core international human rights treaties providing for the protection of the rights of the child. When a State accepts a human rights treaty through ratification or accession, it becomes a State party to that treaty and is under a legal obligation to implement the rights set out in it. Each of the core international human rights treaties has established a committee of independent experts to monitor the implementation of the treaty provisions by its States parties. These committees are referred to as "treaty bodies". Some of the treaties are supplemented by optional protocols.

15.3.2 The working methods of the treaty bodies

The treaty bodies of the core human rights treaties monitor their implementation by reviewing the reports that the States periodically submit. These reports detail what steps the State has taken to implement the treaty provisions. Most bodies are competent to receive and consider individual complaints, while several may conduct inquiries. The **working methods** of the treaty bodies include the following main **procedures**:



Note that not all of the treaty bodies are competent to undertake activities pursuant to all of these procedures. Some of the procedures, for example individual complaints, can normally be utilised with regard to a State that has explicitly consented to the relevant treaty body's competence to consider individual complaints from that State. The Subcommittee on Prevention of Torture, for example, is the only treaty body that carries out periodic visits to States parties to the Optional Protocol to the Convention against Torture.

15.3.3 Overview of the treaty bodies' procedures

	Periodic Reports	Complaints		Inquiry	Inter-State Complaint Disputes	Urgent Action	Visits	General Comments
		Ind	Groups					
CERD	✓	✓	✓		✓	✓		✓
HRC	✓	✓			✓			✓
CESCR	✓							✓
CEDAW	✓	✓	✓	✓	✓			✓
CAT	✓	✓		✓	✓			✓
SPT[442]							✓	
CRC	✓							✓
CMW	✓	✓			✓			✓
CRPD	✓	✓	✓	✓				✓
CED	✓	✓		✓		✓		✓

15.3.4 Periodic reports

Once a State has ratified or acceded to a treaty it is required to submit **periodic reports** on how it has implemented the treaty provisions. The reports must set out the legal, administrative, judicial and other measures that the State has adopted to implement the treaty provisions and should provide any information on the difficulties it has encountered in doing so.

The reporting period varies from treaty to treaty. An initial report is usually required one to two years after the entry into force of the treaty in the State concerned. The timing of subsequent reports varies from two to five years depending on the treaty provisions and the decisions taken by the committees.

In addition to the State party's report, human rights treaty bodies may receive information on the implementation of treaty provisions from UN agencies, funds and programmes and other intergovernmental organisations, national human rights institutions (NHRIs), as well as from civil society, particularly from NGOs (both national and international), professional associations and academic institutions.

States parties are invited to the committee's session to present their reports, respond to committee members' questions, and to provide the committee with additional information. The committee then examines the report in the light of all the information available. The aim is to engage in a constructive dialogue in order to assist a State in its efforts to implement a treaty as fully and effectively as possible.

Based on their dialogue with a State, and any other information they have received, human rights treaty bodies adopt what are generally known as "concluding observations", which include the positive aspects of the State's implementation and the areas where the State needs to take further action. Treaty bodies have no means of enforcing their recommendations. Nevertheless, most States

[442] Subcommittee on Prevention of Torture

take the reporting process seriously, and the committees have proved successful in raising concerns relating to the implementation of the treaties in many states.

In order to assist States in implementing their recommendations, the human rights treaty bodies have begun to introduce procedures to ensure effective follow-up to their concluding observations. Some committees request in their concluding observations that States report back to the rapporteur within an agreed time frame on the measures taken in response to specific recommendations or "priority concerns". The rapporteur then reports back to the committee. Some members of treaty bodies have undertaken visits to countries, at the invitation of the State party, in order to follow up on the report and the implementation of the concluding observations.

If a State fails to report over a long period and has not responded to the committee's requests to report, the treaty bodies have developed a procedure of considering the situation in a country in the absence of a report. This is sometimes referred to as the "review procedure".

15.3.5 Individual complaints (communications)

Seven human rights treaty bodies may, if certain conditions have been fulfilled (for example, the exhaustion of domestic remedies), consider complaints - also referred to as "communications" - from individuals who claim that their rights have been violated by a State party.

A treaty body cannot consider complaints made about a State party unless that State has expressly recognised its competence to do so, either by making a declaration under the relevant treaty article or by accepting the relevant optional protocol.

- The **Committee on the Elimination of Racial Discrimination** may consider individual communications relating to States parties who have made the necessary declaration under Article 14 of the Convention on the Elimination of Racial Discrimination.
- The **Human Rights Committee** may consider individual communications relating to States parties to the First Optional Protocol to the International Covenant on Civil and Political Rights.
- When it enters into force, the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights will allow for individual complaints to the **Committee on Economic, Social and Cultural Rights**.
- The **Committee on the Elimination of Discrimination against Women** may consider individual communications relating to States parties to the Optional Protocol to the Convention on the Elimination of Discrimination Against Women.
- The **Committee on the Rights of Persons with Disabilities** may consider individual communications relating to States parties to the Optional Protocol to the Convention on the Rights of Persons with Disabilities.
- The **Committee on Enforced Disappearances** may consider individual communications relating to States parties who have made the necessary declaration under Article 31 of the International Convention for the Protection of All Persons from Enforced Disappearance.
- When it enters into force, the Third Optional Protocol to the Convention on the Rights of the Child on a communications procedure will allow for individual complaints to the **Committee on the Rights of the Child** for violations of the CRC as well as the Optional Protocol on the sale of children, child prostitution and child pornography and the Optional Protocol on the involvement of children in armed conflict.

In addition to individual communications, some treaties also contain provisions to allow communications from groups of individuals who claim that their rights have been violated by a State party, namely:

* The Committee on the Elimination of Racial Discrimination (CERD);
* The Committee on the Elimination of Discrimination against Women (CEDAW);
* The Committee on the Rights of Persons with Disabilities (CRPD); and
* The Committee on the Rights of the Child (CRC) (once the Third Optional Protocol comes into force).

The treaty body first examines in closed session the admissibility and merits of the communication. After that it makes its decisions, which are also known as opinions or views. In its decisions the treaty body may find a violation by the State of a right protected by the treaty and call for the State to provide the victim with an appropriate remedy.

Before reaching its final decision, the treaty body can adopt interim measures in urgent cases to preserve a situation until it can make a final decision on the matter. By requesting the State to take interim measures the treaty body safeguards the alleged victim from irreparable harm, such as not carrying out a death sentence or not proceeding with forced evictions.

The treaty body is not a court and has no means of enforcing its decisions; however, its decisions have authoritative force and States parties are expected to abide by them in accordance with their treaty obligations.

15.3.6 Advantages and disadvantages of submitting a complaint to a treaty body

ADVANTAGES	• An important advantage of submitting a complaint to a treaty body is that, once a State party has made the relevant declaration under the treaty, it should comply with its obligations under that treaty, including the obligation to provide an effective remedy for breaches of the treaty. The relevant human rights treaty body, through individual complaints, authoritatively determines whether there has been a violation, and the State concerned has an obligation to give effect to the treaty body's finding(s). • Human rights treaty bodies can issue interim measures in urgent cases to preserve a situation until they make a final decision on the matter. This interim measure will stay in place until the decision is made. • Decisions of human rights treaty bodies can go beyond the circumstances of the individual case and provide guidelines to prevent a similar violation occurring in the future. • Human rights treaty bodies can also consider complaints that are being, or have been, addressed by a special procedure.
DISADVANTAGES	• The complainant's case must fall within the scope of application of one of the treaties that allow for individual complaints. • The State in question must be a party to the treaty and must have ratified the relevant optional protocol or accepted the competence of the specific human rights treaty body to accept complaints. • When submitting an allegation to a human rights treaty body a number of requirements must be met, including the consent or authorisation of the victim. If any of these requirements are not met or are missing, the complaint may not be considered. • Under the ICERD, complaints must be lodged within six months of the final decision by a national authority in a given case. • The complainant must have exhausted all available and effective domestic remedies before sending a complaint to a treaty body—a remedy is considered effective if it offers a reasonable prospect of redress for the complainant. • It takes two to three years, on average, for a final decision to be taken

on a complaint.
- Generally, a complaint addressed to a human rights treaty body does not relate to a widespread pattern of human rights violations.
- Human rights treaty bodies may not consider a case that is already being considered by another international or regional adjudicative complaint procedure.

15.3.7 General comments

Each of the human rights treaty bodies publishes its interpretation of the provisions of the human rights treaty it monitors in the form of general comments (although the CERD and the CEDAW Committee use the term "general recommendations").

General comments provide guidance on the implementation of a convention. They cover a variety of subjects ranging from the comprehensive interpretation of substantive provisions to general guidance on the information on specific articles of the treaty that States should submit in their reports.

The following are some of the ways that civil society can engage with the human rights treaty bodies system:

* Promoting the adoption of new international instruments and the ratification of or accession to existing treaties;
* Monitoring the reporting obligations of States parties;
* Submitting information and material to human rights treaty bodies, including written reports;
* Attending and contributing to human rights treaty body sessions as observers or through oral submissions;
* Following up on human rights treaty bodies' concluding observations;
* Submitting an individual complaint to human rights treaty bodies (CERD, HRC, CEDAW, CAT and CMW);
* Providing information for confidential inquiries (CEDAW and CAT);
* Providing information for early warning and urgent action procedures (CERD);
* Attending and contributing to the annual meeting of chairpersons and the inter-committee meeting of the human rights treaty bodies.

15.3.8 How to contact human rights treaty bodies

All the committees can be contacted through the Office of the United Nations High Commissioner for Human Rights in Geneva at:

[Name of the committee]
c/o Office of the United Nations High Commissioner for Human Rights
Palais des Nations
8–14 Avenue de la Paix
CH–1211 Geneva 10 - Switzerland
Fax: +41 (0)22 917 90 29

15.4 The Human Rights Council

The United Nations **Human Rights Council** (UNHRC) is the principal UN intergovernmental body responsible for human rights. Established by General Assembly Resolution 60/251, it replaced and

assumed most of the mandates, mechanisms, functions and responsibilities previously entrusted to the Commission of Human Rights. The Office of the High Commission for Human Rights (OHCHR) is the secretariat for the UNHRC, as it was for the Commission on Human Rights. The UNHRC is a subsidiary body of the General Assembly.

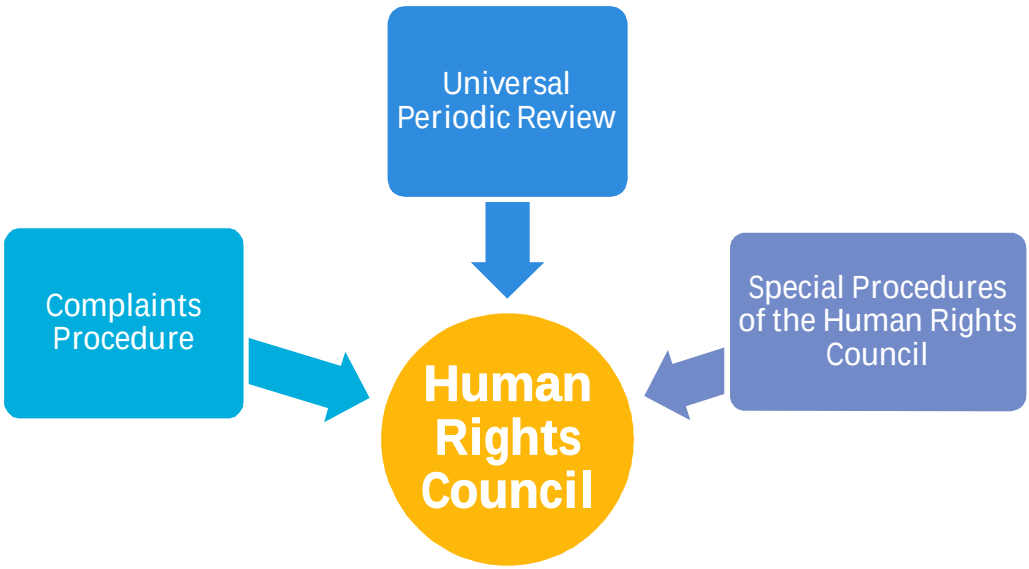
The UNHRC aims to promote and strengthen the protection of human rights worldwide. It meets in Geneva for ten weeks a year. It is an inter-governmental body composed of 47 UN Member States elected by the majority of the General Assembly who serve for an initial period of three years, and cannot be elected for more than two consecutive terms. If a Member State of the Council commits gross and systematic violations of human rights, the General Assembly, by a two-thirds majority of the members present and voting, may suspend that State's membership of the Council.

15.4.1 Monitoring mechanisms of the Human Rights Council

The UNHRC is a forum empowered to prevent abuse, inequality and discrimination, to protect the most vulnerable, and expose human rights violations. In order to achieve its mandate it has several mechanisms at its disposal:

* The Universal Periodic Review (UPR);
* The Complaints Procedure (which replaced the previous "1530 procedure"); and
* Special Procedures.

The **Human Rights Council Advisory Committee** was established by the UNHRC. It replaced the Sub-Commission on the Promotion and Protection of Human Rights. The Advisory Committee, consisting of 18 experts, is a subsidiary body of the UNHRC and it functions as think-thank for the Council, focusing mainly on studies and research-based advice. The Advisory Committee may make suggestions to the Council to enhance its procedural efficiency and to develop research proposals within the scope of its work.



15.4.2 NGOs with consultative status with the ECOSOC

NGOs with consultative status with the United Nations Economic and Social Council (ECOSOC) can be accredited to participate in the Human Right's Council's sessions as observers. Even though UNHRC is not subsidiary of ECOSOC, only NGOs in consultative status with the ECOSOC can be accredited to participate in the Human Rights Council's sessions as observers.

Once accredited as observers, NGOs in consultative status with ECOSOC enjoy a number of privileges and arrangements at the Human Rights Council. NGOs are able, among things, to:

* Attend and observe all HRC proceedings with the exception of deliberations under the Complaints Procedure;
* Submit written statements to the HRC;
* Make oral interventions before the HRC;
* Participate in the UPR which involves a review of the human rights records of all UN Member States every four years;
* Participate in debates, interactive dialogues, panel discussions and informal meetings;
* Organize 'parallel events' on issues relevant to the work of the HRC.

NGOs with consultative status also have a responsibility to conform at all times to the principles governing the establishment and nature of the consultative relationship. In particular, ECOSOC Resolution 1996/31 provides that an NGO may be suspended or excluded from participating in United Nations meetings, or have its consultative status withdrawn where, among other things, it clearly abuses its status by engaging in a pattern of acts contrary to the purposes and principles of the UN Charter.

15.4.3 The application process

The consultative relationship with ECOSOC is governed by ECOSOC Resolution 1996/31, which outlines the eligibility requirements for consultative status, the rights and obligations of NGOs with consultative status, the procedures for the withdrawal or suspension of consultative status, the role and functions of the ECOSOC Committee on NGOs, and the responsibilities of the UN Secretariat in supporting the consultative relationship.

Consultative relationships with ECOSOC may be established with international, regional, sub-regional, and national non-governmental, non-profit, public or voluntary organisations.

To attain consultative status with the ECOSOC, an NGO **must**:

* Carry out work that is relevant to the work of ECOSOC;
* Have a transparent and democratic decision-making process and a democratically adopted constitution;
* Have an established headquarters with an executive officer;
* Have been in existence for at least 2 years (ECOSOC resolution 1996/31, part IX, paragraph 61(h));
* Have appropriate mechanisms for accountability;
* Provide financial statements, including contributions and other support, and expenses, direct or indirect to the Committee.

In addition an NGO **should**:

* Have the authority to speak for its members;
* Have a representative structure.

NGOs affiliated with an international organisation already in consultative status with ECOSOC can be granted consultative status by the ECOSOC Committee on NGOs if they demonstrate that their work is directly relevant to the aims and purpose of the UN.

15.4.4 The six steps to obtaining consultative status with ECOSOC

The steps included in the ECOSOC's processing, review and approval of an application are:

i. Creating a profile for your organisation;
ii. Submitting the online application which includes a questionnaire and supporting documentation;

iii. Initial screening of your application by the NGO Branch to ensure that your application is complete;
iv. Review of your application by the ECOSOC Committee on NGOs at its regular session in January or at its resumed session in May;
v. Recommendation by the Committee;
vi. Decision taken by ECOSOC on your application in July.[443]

15.4.5 Accreditation

An NGO with consultative status with ECOSOC that wishes to attend a session of the Human Rights Council must send a letter of request for accreditation to its Secretariat in Geneva, well in advance of the relevant session.

Letters requesting accreditation should:

* Be submitted on the official letterhead of the organisation;
* Clearly state the title and duration of the session that the organisation wishes to attend;
* Be signed by the president or main representative of the organisation in Geneva; and
* Indicate the name(s) of the person(s) who will represent the organisation at the Human Rights Council's session. Note that the names of persons must appear exactly as they appear in identification documents and family names should be capitalized.

15.4.6 Participation in the work of the Human Rights Council

Written statements

Ahead of a given Human Rights Council's session, NGOs with consultative status with ECOSOC may submit to the Human Rights Council, individually or jointly with other NGOs, written statements that are relevant to the Human Rights Council's work. These statements must be on issues that the NGO is an expert on. Once received and processed by the HRC's secretariat, NGOs' written statements become part of the official documentation of Human Rights Council's sessions.

Guidelines for submitting written statements:

* NGOs in **general consultative status** with ECOSOC may submit written statements of not more than **2000 words**;
* NGOs in **special consultative status** with ECOSOC or on the Roster may submit written statements of not more than **1500 words**;
* NGOs are encouraged to consult the General Information Note available on the Human Rights Council's section of the OHCHR website;
* Written statements should be submitted to the Human Rights Council's secretariat at: hrcngo@ohchr.org

Oral statements

NGOs with consultative status with ECOSOC may make oral interventions in general debates and interactive dialogues at Human Rights Council sessions. The procedure for NGO oral interventions can be found on the Human Rights Council's Extranet under the NGO Liaison information page.

Representatives of NGOs wishing to make oral interventions should register in person at the "List of Speakers" desk in the meeting room. Registration forms for individual and joint statements can be downloaded from the Human Rights Council's homepage and should be brought in person when registering.

[443] More information on each step of the application process is available in the brochure Working with ECOSOC: an NGOs Guide to Consultative Status which is available online at: http://csonet.org/content/documents/Brochure.pdf

NGOs are not permitted to distribute documents, pamphlets or any other material in the meeting room. However, copies of NGOs' oral statements may be placed on the designated table at the back of the room. All other NGO documentation may be placed on the designated NGO tables outside the plenary room.

Parallel events

Once accredited to attend HRC sessions, NGOs with consultative status with ECOSOC may organize public events that relevant to the work of the Human Rights Council. These events are known as "parallel events" and take place around the sessions, normally during lunch breaks. Rooms are provided free of charge for the hosting of parallel events and bookings are processed on a 'first come, first served' basis. NGOs wishing to co-sponsor a parallel event should complete a "co-sponsorship form".

Parallel events usually combine panel presentations with open discussion, providing NGOs with a forum to share their experiences and engage with other NGOs, States and stakeholders (including special procedures mandate-holders) on human rights issues and situations that are relevant and important to the Human Rights Council.

NGOs hosting a parallel event may invite persons that are not accredited to the Human Rights Council's session to attend the parallel event. A complete list of the invitees must be provided to the Human Rights Council's secretariat and to the Pregny security office 48 hours before the event in order for invitees to be accredited. Invitees will be issued with accreditation for the parallel event only. NGOs hosting a parallel event are responsible for its content and for the conduct of participants at the event.

Guidelines for organising a parallel event:

* The secretariat does not provide interpreters for NGO parallel events. NGOs may bring their own interpreters if they wish and should inform the secretariat accordingly ahead of time;
* The use of cameras/video recorders at parallel events is not encouraged, except by journalists duly accredited with the United Nations Office at Geneva (UNOG);
* Room bookings for the hosting of parallel events should be faxed to: Fax: + 41 (0) 22 917 90 11;
* For current information on accreditation, written statements, oral statements and parallel events visit the NGO Liaison information page on the Human Rights Council Extranet.

15.4.7 NGOs without consultative status

While consultative status with ECOSOC is required for NGOs to be accredited as observers to the Human Rights Council's sessions, organisations without consultative status can still contribute to the work of the Human Rights Council in a number of ways. Furthermore, the HRC's meetings are broadcast live on an OHCHR webcast, and a broad range of documentation and information is available on the Council's homepage and Extranet.

To access the password-protected Extranet page, fill in the online form available from the Human Rights Council page of OHCHR's website. When you have done this you will receive a username and a password by email.

15.4.8 Key contacts for the Human Rights Council

The Human Rights Council Branch: Human Rights Council Branch Office of the United Nations High Commissioner for Human Rights Palais des Nations 8–14, Avenue de la Paix, CH–1211 Geneva 10 - Switzerland

Phone: +41 (0)22 917 92 56; Fax: +41 (0)22 917 90 11

The Civil Society Unit: OHCHR Civil Society Unit Office of the United Nations High Commissioner for Human Rights Palais des Nations 8–14, Avenue de la Paix CH–1211 Geneva 10 - Switzerland

Phone: +41 (0)22 917 90 00; E-mail: civilsocietyunit@ohchr.org

For requests or information relating to consultative status with ECOSOC: United Nations Headquarters**,** NGO Section United Nations Department of Economic and Social Affairs Section One UN Plaza, Room DC-1-1480 New York, NY 10017, USA

Phone: +1 212 963 8652; Fax: +1 212 963 9248; E-mail: desangosection@un.org

United Nations Office at Geneva (UNOG): NGO Liaison Office of the Director-General Office 153, Palais des Nations 8–14, avenue de la Paix CH-1211 Geneva 10 - Switzerland

Phone: +41 (0)22 917 21 27; Fax: +41 (0)22 917 05 83; E-mail: ungeneva.ngoliaison@unog.ch

15.4.9 Universal Periodic Review

The Universal Periodic Review (UPR) is a unique procedure aimed at scrutinising the human rights practices of every country every four years. The UPR is a State-driven process, under the auspices of the UNHRC, which provides the opportunity for each State to declare what actions they have taken to improve the human rights situation in their countries and to fulfil their human rights obligations. The analysis, which consists of a compilation of material by the Office of the High Commissioner for Human Rights, a UNHRC self-assessment questionnaire and additional information provided by stakeholders (including NGOs), is then submitted in a report to the UNHRC.

15.4.10 UPR and Zimbabwe

Zimbabwe was subject to the UPR in 2011 and the corresponding report (Human Rights Council, Report by the Working Group for the UPR on Zimbabwe, A/HRC/19/14, 19 December 2011) was adopted by the UNHRC at its Nineteenth Session. Although there is no additional legal recourse available under this mechanism, the outcome of the Zimbabwean UPR is relevant to any future use of the UNHRC Complaints Procedure.[444]

15.4.11 Participation of Civil Society in the UPR

The UPR process ensures the participation of all relevant stakeholders, including, NGOs, national human rights institutions (NHRIs), human rights defenders, academic institutions and research institutes, regional organisations, as well as civil society representatives. These actors can submit information to be added to the "other stakeholders" report, which is considered during the review. The information they provide can be referred to by any of the States taking part in the interactive discussion during the review at the Working Group meeting.

NGOs in consultative status with the ECOSOC can be accredited to participate in the UPR Working Group sessions and can make statements at the regular session of the Human Rights Council when the outcome of the State reviews are considered. OHCHR has released "Technical guidelines for the submission of stakeholders".[445]

15.4.12 Form

Submissions, which do not respect the guidelines below will not be considered.

☒ **Length and format**

* Written submissions should not exceed 2815 words in the case of individual submissions, to which additional documentation can be annexed for reference. Submissions by coalitions of stakeholders should not exceed 5630 words.

[444] The documents considered in the course of Zimbabwe's UPR are available at:http://www.ohchr.org/EN/HRBodies/UPR/PAGES/ZWSession12.aspx.
[445] Available at: http://www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf

* Information included in footnotes or endnotes is not included in the word count.
* Pages and paragraphs should be numbered.
* Written submissions should be saved as a Word document only.

☒ **Identification of the stakeholder**

* Written submissions should be clearly identified. The cover page of the written submission should clearly identify the submitting stakeholder(s) (for example using a letterhead, name and acronym, logo or webpage).
* It is important that stakeholders include their contact details in the body of the email used to send their submissions. A paragraph describing the main activities of the submitting organisation/coalition, as well as date of its establishment would be also welcomed.
* The cover page is not included in the word count.

☒ **Language**

* Written contributions should be submitted in UN official languages only, preferably in English, French or Spanish.

15.4.13 Guidelines to stakeholders

* Stakeholders are encouraged to consult with one another at the national level for the preparation of the UPR submissions. Joint submissions by a group of stakeholders are encouraged where each stakeholder focuses on similar issues.
* The UPR mechanism does not provide for confidentiality. Submissions made in line with the abovementioned guidelines will be made available online on OHCHR's website and will include the name of the submitting stakeholder.
* Consequently, reference to individual cases should be made only if the safety and well being of all the individuals concerned will not be jeopardised by such a reference.
* Deadlines for stakeholders' submissions will be posted on the OHCHR UPR webpage (at http://www.ohchr.org/EN/HRBodies/UPR/Pages/NgosNhris.aspx), usually eight to ten months before the review.
* Stakeholders should note that written submissions to the OHCHR should be sent at least five months before the relevant session of the Working Group on UPR. Submissions received after the deadlines will not be considered. Written submissions should be final; it is not possible to accommodate revisions.[446]

15.4.14 Contact information

Stakeholders' submissions should be sent to uprsubmissions@ohchr.org

While stakeholders are discouraged from faxing or mailing a hard copy of their submission to the OHCHR Secretariat, they may do so in the case of repeated technical difficulties with electronic mail to: +41 22 917 90 11.

The OHCHR Secretariat will confirm receipt of your message and submission electronically.

Each electronic submission and relevant e-mail message should refer to **one country only**. In the title of the e-mail message accompanying the submitted documents you should include: the name of the (main) stakeholder submitting the contribution, the kind of contribution (individual and/or joint), the name of the reviewed country and the month and year of the relevant UPR session, e.g., *"Women's coalition – joint UPR submission – Ecuador – June 2012" or "National Human Rights Institution of the*

[446] Guidelines on the style of the written submissions are available at: http://www.ohchr.org/Documents/HRBodies/UPR/TechnicalGuideEN.pdf

United Kingdom of Great Britain and Northern Ireland (EHRC) – UPR Submission - United Kingdom of Great Britain and Northern Ireland – June 2012."[447]

15.5 Human Rights Council Complaints procedure

Body	Procedure	Who?	Which violations?	Threshold	Confidential
Human Rights Council (WGC & WGS)	Communication (Complaint Procedure)	Victim(s), any person or group of persons or NGOs	Any human right or fundamental freedom	A consistent pattern of gross and reliably attested violations	Yes

15.5.1 Objective and scope

On 18 June 2007, the Human Rights Council adopted a resolution entitled "UN Human Rights Council: Institution Building" (Resolution 5/1) which established a new Complaints Procedure to address **consistent patterns of gross and reliably attested violations of all human rights and all fundamental freedoms occurring in any part of the world and under any circumstances**. It is based on the former Commission's so-called "1530 procedure" but it has been improved so as to ensure that the procedure is impartial, objective, efficient, victim-orientated and conducted in a timely manner.

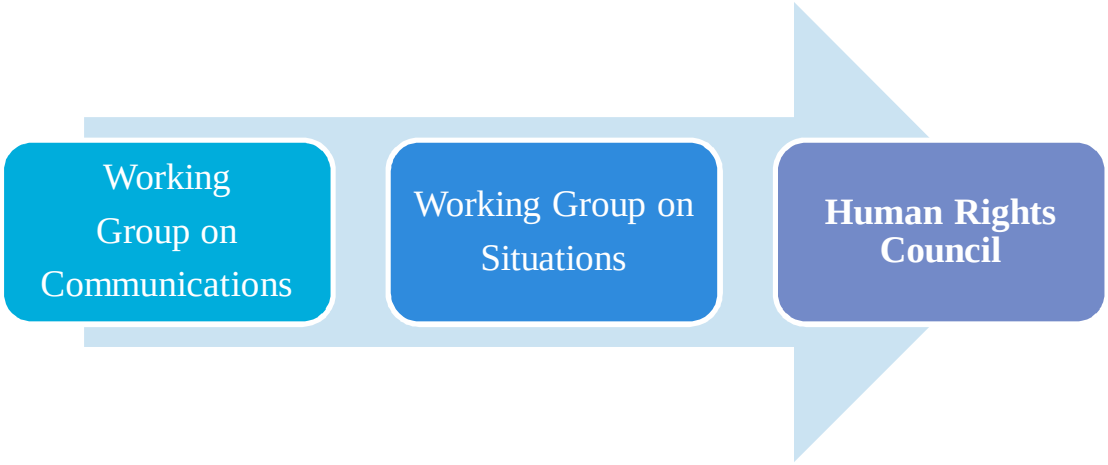
15.5.2 How does the complaints procedure work?

The complaints procedure is based on **communications** received from individuals, groups or organisations that claim to be victims of human rights violations or that have direct, reliable knowledge of such violations. It is confidential, with a view to enhancing cooperation with the State concerned. The procedure includes two distinct working groups who examine communications and bring consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms to the attention of the Council:

* Working Group on Communications (WGC)
* Working Group on Situations (WGS)

Manifestly ill-founded and anonymous communications are screened out by the Chairperson of the WGC, together with the Secretariat, based on admissibility criteria. Communications that get through the initial screening are transmitted to the State concerned in order to obtain its views on the alleged violations.

[447] Further information regarding the UPR is available on the UPR Info's website at http://www.upr-info.org/. Information on the participation and involvement of the NGOs in the UPR is available at http://www.upr-info.org/-NGOs-.html.



The WGC is made up of members of the Human Rights Council Advisory Committee, each in post for a term of three years that can be renewed once. The WGC consists of five independent and highly qualified experts and is geographically representative of the five regional groups. The WGC meets twice a year for five working days to assess the admissibility and merits of a communication, including whether the communication alone or in combination with other communications, appears to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.

All admissible communications and recommendations are then transmitted to the Working Group on Situations (WGS).

The WGS comprises five members appointed by the regional groups from among the Member States of the Council. Each individual is in post for one year, with one possible renewal. It meets twice a year for five working days to examine the communications transferred to it by the WGC, including States' replies and the situations which the Council is already seized of under the complaints procedure.

The WGS, on the basis of the information and recommendations provided by the WGC, presents the Council with a report on consistent patterns of gross and reliably attested violations of human rights and fundamental freedoms and makes recommendations to the Council on the course of action to take.

The Council then makes a decision about each situation.

15.5.3 Who can submit a complaint?

Any individual or group claiming to be the victim of human rights violations may submit a complaint under this procedure, as may any other person or group with direct and reliable knowledge of such violations.

Communications under this procedure are not tied to the acceptance of treaty obligations by the country concerned or the existence of a Special Procedures mandate. The complaint procedure deals with consistent patterns of gross human rights violations in a State. It neither compensates alleged victims, nor does it seek a remedy for individual cases.

15.5.4 Admissibility criteria for communications

A communication of a violation of human rights and fundamental freedoms, for the purpose of this procedure, shall be admissible, provided that:

- ☒ It is not manifestly politically motivated and its object is consistent with the Charter of the United Nations, the Universal Declaration of Human Rights and other applicable instruments in the field of human rights law;

- ☒ It gives a factual description of the alleged violations, including the rights which are alleged to be violated;
- ☒ Its language is not abusive. However, such a communication may be considered if it meets the other criteria for admissibility after deletion of the abusive language;
- ☒ It is submitted by a person or a group of persons claiming to be the victims of violations of human rights and fundamental freedoms, or by any person or group of persons, including non-governmental organisations, acting in good faith in accordance with the principles of human rights, not resorting to politically motivated stands contrary to the provisions of the Charter of the United Nations and claiming to have direct and reliable knowledge of the violations concerned. Nonetheless, reliably attested communications shall not be inadmissible solely because the knowledge of the individual authors is second-hand, provided that they are accompanied by clear evidence;
- ☒ It is not exclusively based on reports disseminated by mass media;
- ☒ It does not refer to a case that appears to reveal a consistent pattern of gross and reliably attested violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional complaints procedure in the field of human rights;
- ☒ Domestic remedies have been exhausted, unless it appears that such remedies would be ineffective or unreasonably prolonged.

National human rights institutions (NHRIs), established under the Principles Relating to the Status of National Institutions (the Paris Principles), may be an effective way of addressing individual human rights violations.

15.5.5 Information that must be included in a complaint

The following information should be included in complaints submitted to the Human Rights Council:

- ☒ Identification of the person(s) or organisation(s) submitting the communication (this information will be kept confidential, if requested). Anonymous complaints are not admissible;
- ☒ Description of the relevant facts in as much detail as possible, providing names of alleged victims, dates, locations and other evidence;
- ☒ Purpose of the complaint and the rights allegedly violated;
- ☒ Explanation of how the case may reveal a pattern of gross and reliably attested human rights violations rather than individual violations;
- ☒ Details of how domestic remedies have been exhausted, or an explanation of how such remedies would be ineffective or unreasonably prolonged.

15.5.6 Guidelines on the complaints procedure

* All complaints must be **in writing**. It is not sufficient to rely on mass media reports. If a complainant intends to submit a human rights report as evidence, he or she must attach a cover letter to identify themselves, explaining the case that they want to make and stating that they wish the complaint to be dealt with under the Human Rights Council's complaint procedure.
* It is advisable to **limit the complaint to 10-15 pages**. Additional information may be submitted at a later stage.
* Complaints can be written in English, French, Russian or Spanish. Documents in other languages should be translated or summarised in one of these languages.

15.5.7 The stages of the complaints procedure

☒ **Stage 1: Initial screening**

The OHCHR Secretariat, together with the Chairperson of the Working Group on Communications, screens all communications as they arrive, on the basis of the admissibility criteria, and discards those found to be manifestly ill-founded or anonymous. If a communication is admitted to the next stage of the procedure, the author receives a written acknowledgement and the communication is sent to the State concerned for reply.

☒ **Stage 2: Working Group on Communications**

The Working Group examines complaints that have passed the initial screening stage and any replies received from States with a view to bringing to the attention of the Working Group on Situations any particular situation appearing to reveal a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms.

☒ **Stage 3: Working Group on Situations**

The Working Group on Situations assesses the cases referred to it and produces a report for the Human Rights Council with specific recommendations on the action to be taken with regard to any situation that reveals a consistent pattern of gross violations. Alternatively, it may decide to keep a situation under review or to dismiss a case.

☒ **Stage 4: Human Rights Council**

The Human Rights Council considers, in plenary, situations brought to its attention by the Working Group on Situations as frequently as necessary, but at least once a year. Unless it decides otherwise, it examines the reports of the Working Group on Situations confidentially. Based on its consideration of a situation the Council may take action, usually in the form of a resolution or decision.

The Human Rights Council may decide on the following measures:

* To discontinue the consideration of the situation when further consideration or action is not warranted;
* To keep the situation under review and request the State concerned to provide further information within a reasonable period of time;
* To keep the situation under review and appoint an independent and highly qualified expert to monitor the situation and report back to it;
* To discontinue reviewing the matter under the confidential complaints procedure in order to consider the matter in public;
* To recommend that the OHCHR should provide technical cooperation, capacity-building assistance or advisory services to the State concerned.

All material provided by individuals and States regarding a situation under consideration, as well as the decisions taken at the various stages of the procedure, remain confidential. This also applies to situations that have been discontinued.

15.5.8 Where to send a communication

Communications intended for handling under the Council Complaint Procedure may be addressed to:

Human Rights Council and Treaties Division
Complaint Procedure
OHCHR-UNOG
1211 Geneva 10
Switzerland
Fax: (41 22) 917 90 11

15.5.9 Advantages and disadvantages of the complaints procedure

ADVANTAGES	* The procedure deals with violations of all human rights and fundamental freedoms; a State does not have to be a party to a treaty for a complaint against it to be submitted. * A complaint may be brought against any State. * A complaint may be submitted by the victim or anyone acting on the victim's behalf and does not necessarily require the victim's written authorisation. * Complainants (authors of communications) are informed of the decisions taken at the various key stages of the process. * The admissibility criteria are generally less strict than for other complaints mechanisms. * The complaints procedure is confidential, thus the identities and specific complaints of the victims are protected from public disclosure. Individual complainants can also request that their details be kept confidential from the Nigerian government. * It is not necessary that all domestic remedies have been exhausted if it can be proven that the domestic remedy would be "ineffective or unreasonably prolonged". It would be necessary to provide evidence of the lack of effectiveness of domestic remedies in Nigeria. * The complaints procedure aims at providing a speedy solution that protects human rights in cooperation with the State involved. So if evidence can be submitted to the Nigerian Government through the UNHRC that the rights of children are not being protected, the Nigerian central government may exert pressure on State governments to take preventive measures and to ensure adequate investigations and prosecutions. * General Assembly Resolution 60/251 authorises the General Assembly to suspend rights of membership of the UNHRC if that member commits gross and systematic violations of human rights. If a complaint is made before the end of 2012, while Nigeria is a member of the UNHRC, and it is found that gross and systematic violations of human rights have occurred, Nigeria's UNHRC membership may be suspended.
DISADVANTAGES	* The process can be lengthy, since the complaint goes through several stages of consideration, and therefore may not be suitable for urgent cases. Although the new complaints procedure aims to ensure that the process is conducted in an impartial, objective, efficient, victim-orientated and timely manner, the reality of the procedure suggests

otherwise. This is because the Working Groups only meet twice a year and the procedure remains reliant on State cooperation. In the past, Nigeria has not been very responsive to letters of allegations or urgent appeals made by UN bodies.

* A decision of the UNHRC is not legally enforceable and cannot oblige Nigeria to address its domestic human rights situation. Moreover, as the UNHRC complaints procedure is still relatively new, there is little guidance available as to the impact that a finding of a violation has on the State's human rights compliance.
* As the process is confidential, the individual complainant has no idea of how the complaint is progressing or what the outcome of the complaint is. Accordingly, this procedure cannot attract media attention that might exert pressure on the Nigerian government.
* The complainant must have exhausted all available and effective domestic remedies before sending information under this procedure.
* There are no provisions for urgent interim measures to ensure human rights protection.
* Communications must generally refer to a consistent pattern of human rights violations affecting a larger number of people, rather than individual cases.
* Cases that appear to reveal a consistent pattern of gross violations of human rights already being dealt with by a special procedure, a treaty body or other United Nations or similar regional human rights complaints procedure are not admissible under this procedure.
* There is no possibility of obtaining compensation and/or enforcing prosecutions in relation to individual complaints.

15.6 Special Procedures

Special Procedures is the general name given to the mechanisms established by the Commission on Human Rights and assumed by the Human Rights Council to address either specific country situations or thematic issues in all parts of the world.

Special Procedures are either an **individual** - a special rapporteur or special representative, or independent expert - or a **working group**. They are prominent, independent experts working on a voluntary basis, appointed by the Human Rights Council, and they serve in their personal capacity.

Special Procedures mandates usually call on mandate-holders to examine, monitor, advise and publicly report on human rights situations in specific countries or territories, known as **country mandates**, or on major phenomena of human rights violations worldwide, known as **thematic mandates**. There are currently 30 thematic mandates and 8 country mandates (Burundi, Cambodia,

Democratic People's Republic of Korea, Haiti, Myanmar, Occupied Palestinian Territory, Somalia and Sudan). All report their findings and recommendations to the UN Human Rights Council. They are sometimes the only mechanism that will alert the international community to certain human rights issues.

The activities of Special Procedure mandate-holders include:

* Receiving and analysing information on human rights situations provided by various sources on an on-going basis;
* Networking and sharing information with partners, both governmental and non-governmental, within and outside the United Nations;
* Seeking - often urgently - clarification from governments on alleged violations and, where required, asking governments to implement protection measures to guarantee or restore the enjoyment of human rights;
* Raising awareness of specific human rights situations and phenomena, including threats to and violations of human rights;
* When specific circumstances so warrant, communicating their concerns through the media and by means of public statements;
* Undertaking country visits to assess human rights situations under their respective mandates, and making recommendations to governments with a view to improving those situations;
* Reporting and making recommendations to the Human Rights Council and, where relevant to their mandates, to the General Assembly (and in some cases to the Security Council) on the activities undertaken such as field visits, and on specific thematic trends and phenomena;
* Contributing thematic studies for the development of authoritative principles and standards in their mandated area and possibly providing legal expertise on specific issues.

The OHCHR provides Special Procedures mandate-holders with personnel, logistical and research assistance to support their mandates.

In 2010, the Special Procedures sent 604 communications and undertook 67 country visits to 48 States. The Special Procedures submitted 156 reports to the Human Rights Council, including 58 country visit reports, and 26 reports to the General Assembly. Additionally, 232 press releases and public statements were issued.

15.6.1 Legal basis of the Special Procedures

The General Assembly, in its Resolution 60/251, required the Human Rights Council to review and, where necessary, improve and rationalise the Special Procedures system. In Resolution 5/1 on United Nations Human Rights Council institution building, the Council laid down new selection and appointment procedures for Special Procedures mandate-holders, and established a process for the review, rationalization and improvement of Special Procedures mandates. The Council also adopted Resolution 5/2, setting out the Code of Conduct for Special Procedures mandate holders.

15.6.2 Relevant Special Procedures

The table below lists the Special Procedures that may be relevant to violations of the prerequisite rights for elections in Zimbabwe.[448]

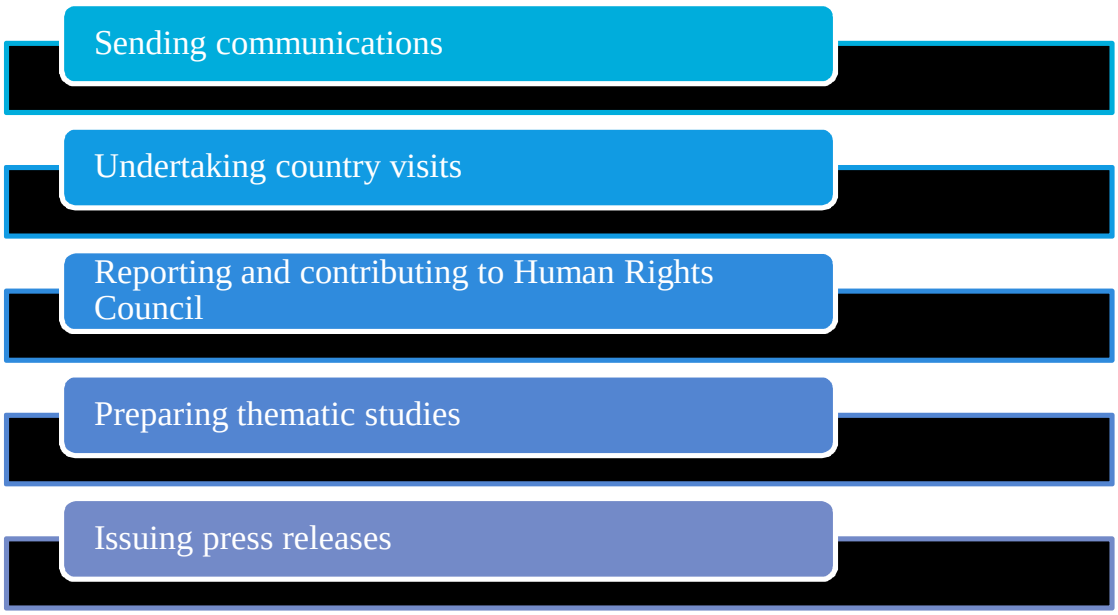
[448] The full list of thematic mandates is available at (last updated on 1 May 2011): http://www2.ohchr.org/english/bodies/chr/special/themes.htm.

Title/Mandate	Established	Current Legal basis	Mandate holders	Contact
Independent expert on the promotion of a democratic and equitable international order	2011	Human Rights Council resolution 18/6	To be appointed at the 19th HRC session	
Special Rapporteur on the rights to freedom of peaceful assembly and of association	2010	Human Rights Council resolution 15/21	Mr. Maina KIAI (*Kenya*)	freeassembly@ohchr.org
Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression	1993	Human Rights Council Resolution 16/4	Mr Frank LA RUE (*Guatemala*)	freedex@ohchr.org
Working Group on Arbitrary Detention	1991	Human Rights Council Resolution 15/18	Mr El Hadji Malick SOW (*Senegal*) Chair-Rapporteur Ms Shaheen Sardar ALI (*Pakistan*) Vice-Chair Mr Roberto GARRETON (*Chile*) Mr Vladimir TOCHILOVSKY (*Ukraine*) Mr Mads ANDENAS (*Norway*)	wgad@ohchr.org
Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment	1985	Human Rights Council Resolution 16/23	Mr Juan MENDEZ *(Argentina)*	sr-torture@ohchr.org
Working Group on Enforced or Involuntary Disappearances	1980	Human Rights Council Resolution 16/16	Mr Jeremy SARKIN *(South Africa)* Chairperson-Rapporteur Mr Ariel DULITZKY (*Argentina/United States of America)* Ms Jazminka DZUMHUR (*Bosnia and Herzegovina*) Mr Olivier de FROUVILLE *(France)* Mr Osman EL-HAJJE *(Lebanon)*	wgeid@ohchr.org

Special Rapporteur on extrajudicial, summary or arbitrary executions	1982	Human Rights Council Resolution 8/3	Mr Christof HEYNS (*South Africa*)	eje@ohchr.org
Special Rapporteur on the promotion and protection of human rights while countering terrorism	2005	Human Rights Council Resolution 15/15	Mr Ben EMMERSON (*United Kingdom of Great Britain and Northern Ireland*)	srct@ohchr.org
Working Group on the issue of discrimination against women in law and in practice	2010	Human Rights Council Resolution 15/23	Ms Emna AOUIJ *(Tunisia)* Ms Mercedes BARGUET *(Mexico)* Ms Kamala CHANDRAKIRANA *(Indonesia)* Ms Frances RADAY *(Israel/United Kingdom)* Ms Eleonora ZIELINSKA *(Poland)*	wgdiscriminationwomen@ohchr.org
Special Rapporteur on violence against women, its causes and consequences	1994	Human Rights Council Resolution 16/7	Ms Rashida MANJOO *(South Africa)*	vaw@ohchr.org
Special Rapporteur on the situation of human rights defenders	2000	Human Rights Council Resolution 16/5	Ms Margaret SEKAGGYA *(Uganda)*	urgent-action@ohchr.org
Special Rapporteur on the independence of judges and lawyers	1994	Human Rights Council Resolution 6/8	Ms Gabriela KNAUL *(Brazil)*	srindependencejl@ohchr.org
Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance	1993	Human Rights Council Resolution 16/33	Mr Githu MUIGAI (*Kenya*)	racism@ohchr.org

15.6.3 How do the Special Procedures work?

Special Procedures mandate holders have a number of tools available to them to meet the terms of their mandates, including:



Sending communications

Body	Procedure	Who?	Which violations?	Threshold	Confidentiality
Special Procedures mandate-holders	Communication + Urgent appeal	Victim(s), any person acting on behalf of the victim(s), NGOs, civil society	Human right violation(s) that fall(s) within the mandate of any of the mandate-holders	Not all Special Procedures mandate-holders can act on individual cases	Yes/No Yes for children

One of the main activities of the Special Procedures mandate-holders is taking action on individual cases, based on information that they receive from relevant and credible sources (mainly civil society actors).

Interventions generally involve sending a letter to a government (letter of allegation) requesting information on and responses to allegations and, where necessary, asking the government to take preventive or investigatory action (urgent appeal). These interventions are known as "communications".

Urgent appeals are sent when the alleged violations are time-sensitive such as those involving loss of life, life-threatening situations or imminent or on-going damage of a very grave nature to victims. Letters of allegation are sent when the urgent appeal procedure does not apply, to communicate information and request clarification about alleged human rights violations.

Mandate-holders may send **joint communications** when a case falls within the scope of more than one mandate. The decision of whether or not to intervene is left to the discretion of Special Procedure mandate-holders and will depend on criteria established by them, as well as the criteria set out in the Code of Conduct. Mandate holders are also required to take into account, in a comprehensive and timely manner, information provided by the State concerned on situations relevant to their mandate.

In their information-gathering activities, mandate-holders must:

* Be guided by the principles of discretion, transparency, impartiality and even-handedness;

* Preserve the confidentiality of sources if divulging them could cause harm to those involved;
* Rely on objective and dependable facts based on evidential standards that are appropriate to the non-judicial character of the reports and conclusions they are required to write; and
* Give representatives of the concerned State the opportunity to comment on their assessments and to respond to the allegations made against the State. The State's written responses are annexed to the mandate-holder's report(s).

How to submit individual cases to Special Procedures mandate-holders

The Special Procedures mechanisms allow for allegations to be of either individual cases or a more general pattern of human rights abuse. All individuals, or those acting on an individual's behalf, can submit individual cases to Special Procedures mandate-holders, if the mandate allows for this. Civil society actors can often support individuals seeking protection from human rights abuses and intervene on their behalf.

Communications sent and received are **usually confidential** and remain so until the mandate holder's report to the Human Rights Council is made public, unless the mandate holder decides to issue a public statement earlier in the process. The report contains information on communications sent and replies received from States on specific cases. It must be noted that the alleged victims are named in the reports, unless they are children or belong to other specific categories of victims, such as victims of sexual violence.

Given the public nature of the reports, it is important that organisations acting on behalf of victims of human rights violations ensure that the victim is aware that his/her case is being communicated to the Special Procedures mechanisms, that his/her name will be communicated to the authorities and that his/her name (or initials) will appear in the public report. However, the victim's authorisation is not always required to submit the case (for example, if the victim is unreachable because he or she is in detention).

Minimum information to be included in communications

Each Special Procedure has established different requirements for the submission of communications. However, the following **minimum information** must be included for a communication to be assessed:

- ☒ The identification of the alleged victim(s) including, where possible and appropriate: full name, occupation, passport number and place of residence, date of birth, sex, ethnic or religious group, the name of any community organisation subject to alleged violations. It must be made clear if any of this information should not be transmitted to the government for the safety of the person concerned;
- ☒ The identification of the alleged perpetrators of the violation and suspected motives;
- ☒ Details of the breach alleged to have been committed, including details of place and date;
- ☒ The identification of the person(s) or organisation(s) submitting the communication (this information will be kept confidential);
- ☒ A detailed description of the circumstances in which the alleged violation occurred, such as any steps taken to rectify the breach.

Civil society actors may also submit follow-up information to mandate holders on whether or not the human rights issue(s)/situation(s) addressed in their original submission has improved. Follow-up information is of great use to mandate holders. Some mandate holders base their requests for country visits on trends identified through the communications procedure.

Information provided to the Special Procedures should not be politically motivated, abusive or based solely on media reports.

Guidelines for the submission of information to the Special Rapporteur

The Special Rapporteur on the rights to freedom of peaceful assembly and of association and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression both provide the following guidelines.

In order for the Special Rapporteur to be able to take action regarding a communication on a case or incident, the following information, as a minimum, must be received.

1. **Allegation regarding a person or persons:**
   * As detailed a description of the alleged violation as possible, including date, location and circumstances of the event;
   * Name, age, gender, ethnic background (if relevant), profession;
   * Views, affiliations, past or present participation in political, social, ethnic or labour group/activity;
   * Information on other specific activities relating to the alleged violation.

2. **Allegation regarding a medium of communication:**
   * As detailed a description of the alleged infringement on the right as possible, including date, location and circumstances of the event;
   * The nature of the medium affected (e.g. newspapers, independent radio);including circulation and frequency of publication or broadcasting, public performances, etc.;
   * Political orientation of the medium (if relevant).

3. **Information regarding the alleged perpetrators:**
   * Name, State affiliation (e.g. military, police) and reasons why they are considered responsible;
   * For non-State actors, description of how they relate to the State (e.g. cooperation with or support by State security forces);
   * If applicable, State encouragement or tolerance of activities of non-State actors, whether groups or individuals, including threats or use of violence and harassment against individuals exercising their right to freedom of opinion and expression, including the right to seek, receive and impart information.

4. **Information related to State actions:**
   * If the incident involves restrictions on a medium (e.g. censorship, closure of a news organ, banning of a book, etc.); the identity of the authority involved (individual and/or ministry and/or department), the legal statute invoked, and steps taken to seek domestic remedy;
   * If the incident involves arrest of an individual or individuals, the identity of the authority involved (individual and/or ministry and/or department), the legal statute invoked, location of detention if known, information on provision of access to legal counsel and family members, steps taken to seek domestic remedy or clarification of person's situation and status;
   * If applicable, information on whether or not an investigation has taken place and, if so, by what ministry or department of the Government and the status of the investigation at the time of submission of the allegation, including whether or not the investigation has resulted in indictments.

5. **Information on the source of the communications:**
   * Name and full address;
   * Telephone and fax numbers and e-mail address (if possible);
   * Name, address, phone/fax numbers and email address (if applicable) of person or organization submitting the allegation.

Note: In addition to the information requested above, the Special Rapporteur welcomes any additional comments or background notes that are considered relevant to the case or incident.

6. Follow-up

The Special Rapporteur attaches great importance to being kept informed of the current status of cases and thus very much welcomes updates of previously reported cases and information. This includes both negative and positive developments, including the release of persons detained for exercising their rights to freedom of opinion and expression and to seek, receive and impart information, or the adoption of new laws or policies or changes to existing ones that have a positive impact on the realization of the rights to freedom of opinion and expression and information.

7. Root causes

In order to carry out his work regarding the root causes of violations, which is of particular importance to the Special Rapporteur, he is very much interested in receiving information on and/or texts of draft laws relating to or affecting the rights to freedom of opinion and expression and to seek, receive and impart information. The Special Rapporteur is also interested in laws or government policies relating to electronic media, including the Internet, as well as the impact of the availability of new information technologies on the right to freedom of opinion and expression.

8. Communications

Where requested or considered necessary by the Special Rapporteur, information on the source of the allegations will be treated as confidential.

Where to send communications?

Individual cases/complaints can be submitted to:

OHCHR-UNOG
8-14 Avenue de la Paix
CH–1211 Geneva 10 - Switzerland
E-mail: urgent-action@ohchr.org
Fax: +41 (0)22 917 90 06

When sending a communication, it is necessary to specify which Special Procedures mechanism the information is addressed to in the subject line of the e-mail or fax, or on the envelope.

15.6.4 Advantages and disadvantages of submitting a communication to the Special Procedures mandate holders

ADVANTAGES	* Communications under Special Procedures can be used for individual cases as well as for a more general pattern of violations; * They can be a useful tool in urgent cases as they allow for urgent or preventive action (known as urgent appeals); * Cases may be brought regardless of the State in which they occur and whether that State has ratified any of the human rights treaties; * It is not necessary to have exhausted all domestic remedies before using the procedure; * The communication is not required to be made by the victim, although the source must be reliable; * A complaint may be lodged simultaneously before a human rights treaty body and a Special Procedure with the relevant mandate; * The communications sent and received are confidential until the expert submits the report to the UNHRC. The names of the alleged

	victims are included in the report, except in the case of children whose names remain confidential; * When the facts and question come within the scope of more than one mandate holder, the mandate-holders can send a joint communication to the State concerned.
DISADVANTAGES	* There must be a Special Procedure in place that covers the specific human rights issue or country (not all Special Procedures mandate holders can act on individual cases); * Special procedures are not legally binding mechanisms. It is within the discretion of each as to whether or not to to comply with the recommendations of Special Procedures mandate holder; * Procedures vary depending on the mandate; * All communications sent and received are confidential until the report is submitted to the UNHRC. This means that both the public and the complainant are not aware of how the process is progressing. Accordingly, very little pressure is applied to the State in question during the progress of the complaint.

15.6.5 Country visits

Country or field visits (or fact-finding missions) are an important tool for Special Procedures mandate holders. Mandate holders typically send a letter to a government asking to visit the country, and, if the government agrees, an invitation to visit is extended. Some countries have issued "standing invitations", which means that they are, in principle, prepared to receive a visit from any Special Procedures mandate holder. Country visits are guided by the provisions contained in the Code of Conduct and the terms of reference for fact-finding missions by Special Procedures.

Country visits allow mandate holders to assess the general human rights situation and/or the specific institutional, legal, judicial and administrative situation in a given State, under their respective mandates. During these visits, mandate holders may meet national authorities, representatives of civil society, victims of human rights violations, the United Nations country team, academics, the diplomatic community and the media.

On the basis of their findings, mandate holders make recommendations in public reports. These reports are submitted to the UNHRC. Some mandate holders hold press conferences and issue preliminary findings at the end of a country visit. The success of country visits is greatly enhanced by the commitment of the government and the participation of civil society actors, before, during and after the visit.

How to provide support for country visits?

Civil society actors can encourage governments to invite mandate holders to visit a country, or to extend a standing invitation to the Special Procedures. Alerting mandate holders to the issues in a particular State may also determine whether a mandate holder requests a visit, as some base their requests for country visits on the amount of information (individual complaints/cases) that they receive. Some mandate holders also conduct joint country visits.

Once a country visit has been confirmed (when a State has approved a mandate-holder's request to visit and dates for the visit have been agreed), civil society actors may raise public awareness of the visit.

Civil society actors can also submit relevant information to and raise matters of concern with a mandate holder before a country visit takes place. This may enable the mandate holder to raise specific issues with the authorities ahead of time and, if needed, make arrangements to include it in the official programme of the visit (for example, by requesting access to specific detention centres or

refugee camps or by arranging to meet with specific national or local authorities, or private individuals).

During a country visit, civil society actors may ask to meet with mandate holders by contacting the mandate holder, or relevant OHCHR staff in Geneva or in the field, by fax, post or e-mail.

Civil society actors can play a key role in follow-up to the conclusions and recommendations resulting from a country visit by:

* Disseminating recommendations to their local constituencies;
* Publicising the work of Special Procedures and developing plans of action and activities to continue the work initiated by the country visit;
* Working with governments towards the implementation of Special Procedures;
* Making recommendations;
* Contributing to specific follow-up reports issued by mandate holders;
* Monitoring the steps the government has taken to meet the recommendations, and keeping the mandate-holder(s) informed of the State's progress towards implementing recommendations.

15.6.6 Reporting and contributing to the Human Rights Council

Special Procedures mandate holders are requested by the Human Rights Council to present annual reports in which they describe the activities undertaken during the previous year. In some circumstances, the Council may ask a mandate holder to report on a specific theme or topic of interest. Reports are public and represent an authoritative tool for campaigning for change.

Annual reports contain information on working methods, theoretical analysis, general trends and developments with regard to the mandate and may contain general recommendations. Reports may also contain summaries of communications transmitted to governments and the replies received. Reports on country visits are usually presented as addenda to the annual reports. Some mechanisms are requested to report to the United Nations General Assembly, which meets in New York from September to December each year.

Special Procedures mandate holders also contribute expertise to other aspects of the Human Rights Council's work.

Thematic studies

Special Procedures mandate-holders can also prepare thematic studies, which are useful tools to guide governments, as well as civil society, on human rights standards and their implementation. Mandate holders also host and attend expert meetings on thematic human rights issues.

Press releases

Special Procedures can — individually or collectively — issue press releases highlighting specific situations or identifying the human rights standards that States should respect.

15.6.7 Civil society and Special Procedures

How to access and work with the Special Procedures

Civil society actors, individually or collectively, may access and work with the Special Procedures. Unlike the United Nations treaty bodies, Special Procedures can be activated even where a State has not ratified the relevant instrument or treaty, and it is not necessary to have exhausted domestic remedies to access the Special Procedures. Special Procedures can therefore be used for any country or human rights issue, within the parameters of existing mandates.

Civil society actors can make use of the Special Procedures by:

* Submitting individual allegations of human rights violations to the relevant Special Procedures mandate holder(s);
* Providing support for country visits and information and analysis on human rights violations to Special Procedures mandate holders;
* Performing a preventive role by providing information to Special Procedures on the introduction of new legislation which may lead to human rights violations;
* Following-up Special Procedures' recommendations locally and nationally;
* Supporting the dissemination of the work and findings of Special Procedures mandate holders;
* Nominating candidates as Special Procedures mandate holders.

Contacting Special Procedures mandate holders

Special Procedures mandate holders may be contacted by:

E-mail: SPDInfo@ohchr.org (for general inquiries and information)
urgent-action@ohchr.org (for individual cases/complaints only)
Fax: +41 (0)22 917 90 06
Post: Quick Response Desk
Office of the United Nations High Commissioner for Human Rights
Palais des Nations
8–14, avenue de la Paix
CH–1211 Geneva 10 - Switzerland

Civil society actors should indicate in the subject line of the e-mail or fax, or on the cover of the envelope, which Special Procedure(s) they wish to contact.

As the contact address is the same for all Special Procedures, a clear indication of the main subject or purpose of the correspondence will allow for a more timely response.

It is essential to also indicate whether the correspondence is aimed at submitting broad information, an individual complaint, or whether it is another type of request (for example, invitation to attend a conference, request for a meeting with the mandate holders and/or their assistants).

Meetings with Special Procedures mandate holders

Special Procedures mandate holders are available for meetings with civil society actors as part of their consultations in Geneva, New York (for those attending the General Assembly) and during their country visits. These meetings are particularly important to help build an ongoing partnership between mandate holders and civil society. The staff servicing mandate holders at OHCHR can be contacted throughout the year to arrange these meetings.

16 African Regional Human Rights Protection Mechanisms

This section will analyse regional instruments and mechanisms for the protection of the rights in Africa, starting with the African Union and the human rights instruments, in particular the African [Banjul] Charter on Human and Peoples' Rights (1981).

It will then analyse the constitution and the competence of the bodies, which have been established to monitor the implementation of these instruments and ensure the protection of these rights. In particular, this chapter will examine:

* The African Commission on Human and People's Rights;
* The African Court on Human and People's Rights;
* The African Court of Justice and Human Rights which will merge and replace the African Court on Human and People's Rights and the Court of Justice of the African Union; and

The section will also provide relevant information on possible participation of NGOs, in the procedures of the African Commission on Human and People's Rights.

Finally this section will examine the instruments and mechanisms for the protection of the rights of the child developed within the **Economic Community of West African States (ECOWAS)** and strategic plan of action and the structure and the competence of the ECOWAS Community Court of Justice.

16.1 African [Banjul] Charter on Human and Peoples' Rights

The African Charter on Human and People's Rights (African Charter) was adopted in 1981 and entered into force on 21 October 1986; it was ratified by Nigeria on 22 June 1983.

The Charter was inspired by the UDHR, the ICCPR and the ICESCR. However, the African Charter reflects a high degree of specificity due to the African concept of the term "right" and the importance that it places on responsibilities. The African Charter contains a comprehensive list of human rights, including civil, political, economic, social and cultural rights.

> *Article 1 of the African Charter provides that the States parties "shall recognize the rights, duties, and freedoms enshrined [therein] and shall undertake to adopt legislative or other measures to give effect to them." Article 25 provides that the States parties "shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter, and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood," Article 26 requires States parties to "allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the [...] Charter."*

Importantly, many of the rights and freedoms guaranteed by the African Charter is are qualified: in some cases the rights can be limited in pursuance of specific aims, in others they can be limited by the provisions of domestic law. However, unlike the ICCPR and ICESR, the African Charter does not provide for any right of derogation for the States parties in public emergencies. The African Commission on Human and People's Rights has interpreted the absence of any such provision to mean that derogations are not permissible under the African Charter.

* Protects not only the rights of individual human beings, but also the rights of peoples;
* Emphasises individuals' duties towards other individuals and groups;
* While certain limitations may be imposed on the exercise of the rights guaranteed by the Charter, no derogations are ever allowed from the obligations imposed under the Charter.

Individual rights

The African Charter recognises civil, political, economic, social and cultural rights of individual human beings. The African Charter recognises peoples' rights.

Individual duties

Article 27(1) stipulates individuals' duties toward certain groups by providing that "*every individual shall have duties towards his family and society, the State and other legally recognized communities and the international community.*" Article 28 concerns individuals' duties towards other individuals by providing that "*every individual shall have the duty to respect and consider his fellow brings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance.*" Article 29 lists specific individuals' duties, including the duty to preserve the harmonious development of the family, the duty to serve one's national community and the duty to preserve and strengthen positive African cultural values.

16.2 African Commission on Human and Peoples' Rights

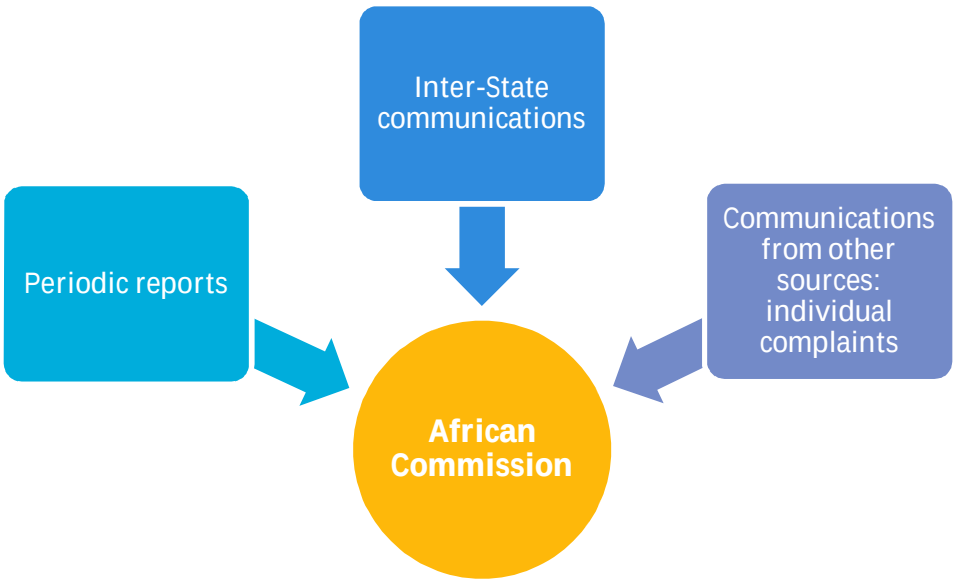
The African Commission on Human and Peoples' Rights (African Commission) is a quasi-judicial body that monitors the implementation of the African Charter. It consists of 11 members serving in their individual capacity and meets bi-annually for two weeks per meeting. The Commission was established under the African Charter to promote and protect human rights, including by receiving communications of human rights violations from States and other sources.

The African Commission has the power to make determinations on particular communications (Articles 47 and 55) and to issue advisory opinions on the interpretation of the African Charter (Article 45(3)).

The African Commission collects documents, undertakes studies and research on African problems, organises conferences, encourages domestic human rights institutions, and gives views and recommendations to governments. It also formulates and lays down principles and rules aimed at solving legal problems relating to human and people's rights and cooperates with other African and international institutions concerned with the promotion and protection of these rights (Article 45(1)).

16.2.1 Procedures before the African Commission

The African Commission has established the following procedures to ensure the implementation of human and peoples' rights as protected by the African Charter:



Periodic reports

Every two years States parties to the African Charter are required to submit a report on the legislative or other measures taken with a view to giving effect to the terms of the Charter (Article 62). Although the Charter does not provide an explicit procedure for the examination of these periodic reports, the African Commission has proceeded to examine them in public session.

Zimbabwe submitted its first report in October 1992, its second report in April 1997 and its 3rd Report in May 2007. The Commission made a number of recommendations.[449]

Inter-State communications

If a State party has good reason to believe that another State party to the African Charter has violated the provisions of the Charter, it may submit a written communication to that State. The State to which the communication is addressed has three months from the receipt of the communication to provide a written explanation. If the matter has not been settled between the two States though bilateral negotiations or any other peaceful procedure, either State can bring it to the attention of the Commission (Article 48).

Notwithstanding these provisions, a State party may refer the matter directly to the Commission (Article 49), but the Commission can only deal with the matter after all domestic remedies have been exhausted in the case, unless the procedure of achieving these remedies would be unduly prolonged (Article 50). The States concerned may be represented before the Commission and submit written and oral statements. After having tried all appropriate means to reach an amicable solution based on respect for the African Charter, the Commission prepares a report stating the facts and findings which is sent, together with recommendations, to the States concerned and to the Assembly of the Heads of State and Governments (Articles 52 and 53).

Communications from other sources: individual complaints

The African Charter is silent as to whether complaints, also referred to as "communications", includes individual complaints for violations of the Charter. The Charter merely provides that, before each session of the Commission, its secretary shall make a list of the communications other than those of States parties and transmit them to the members of the Commission, who shall indicate which communication should be considered by the Commission (Article 55 (1)).

However, the practice is that complaints from individuals as well as NGOs are accepted. Indeed, according to guidelines issued by the African Commission, the complainant need not be related to the victim of the abuse in any way; the only requirement is that the victim must be mentioned. The communication must invoke the provisions of the African Charter alleged to have been violated and must include particularised facts and allegations with relevant documents attached.

The African Commission will only consider a case if all domestic remedies have been exhausted. However, the domestic remedies must be available, effective, sufficient and not unduly prolonged (for example, not subject to lengthy and unnecessary delays). The African Commission's relatively flexible approach to the need to exhaust domestic remedies is demonstrated by the case of *Purohit and Moore* (Comm. No.241/2001 (2003), where it was held that:

> *"The category of people being represented in this present communication are likely to be people picked up from the streets or people from poor backgrounds and as such it cannot be said that the remedies available in terms of the Constitution are realistic remedies for them in the absence of legal aid services."*

The African Commission may, either at the request of the author of the communication or on its own initiative, facilitate **access to free legal aid** to the author in connection with the representation of the case.

Rule 104 of the Rules of Procedure of the African Commission specifies that free legal aid shall only be facilitated where the Commission is convinced:

i. That it is essential for the proper discharge of the Commission's duties, and to ensure equality of the parties before it; and

[449] The reports can be found at: http://www.achpr.org/english/_info/statereport_considered_en.html

ii. The author of the Communication has no sufficient means to meet all or part of the costs involved.

Procedure for considering individual complaints

The African Commission's procedure for considering individual communications is found in Section 4 of the Rules of Procedure:

* At any time after the receipt of a communication and before a determination on the merits, the African Commission may, on its initiative or at the request of a party to the communication, request that the State concerned adopt **provisional measures** to prevent irreparable harm to the victim or victims of the alleged violation as urgently as the situation demands (Rule 98 of the Rules of Procedure).

* The African Commission decides that the communication is **admissible** if it complies with the requirements of admissibility under Article 56 of the African Charter, which are cumulative.

* Once a communication has been declared admissible, the Commission decides on **the merits** of the communication. The Commission deliberates on communications in private, and all aspects of the discussions shall be confidential.

* The decision of the African Commission remains **confidential** and shall not be transmitted to the parties until its publication is authorised by the Assembly.

* The African Commission's decision will not always make provision for remedies. On some occasions, recommendations are supported by a requirement that the State report back on implementation.

* Once the Assembly adopts the Commission's decision, the decision is **published and becomes binding** on the State party concerned.

* The State party must **report back** to the Commission on the steps taken to implement the Commission's decision.

* Although the African Commission's recommendations are binding, they are **not enforceable in domestic courts** and there is **no provision for reparations**.

Guidelines for submission of communications to the African Commission

☒ Criteria for submitting a communication

Article 56 of the African Charter outlines seven conditions that must be met before a communication can be considered by the Commission. These are as follows:

* The communication must include the author's name even if the author wants to remain anonymous;
* The communication must be compatible with the Charter of the OAU and with the present Charter.
* The communication must not be written in insulting language directed against the State or the OAU;
* The communication must not be based exclusively on news from the media;
* The complainant must have exhausted all available domestic legal remedies;
* The communication must be submitted within a reasonable time from the date of exhaustion of domestic remedies;

* The communication must not deal with a matter which has already been settled by some other international human rights body.

☒ **What a communication should include in order to be valid**

* All communications must be **in writing**, and addressed to the Secretary or Chairman of the African Commission on Human and Peoples' Rights.
* There is no form or special format that must be followed, but a communication should contain all the **relevant information**.
* If the communication is submitted by an individual or group of individuals, it should include the **name(s) of the complainant** or complainants, their nationalities, occupation or profession, addresses and signatures.
* If the communication emanates from an **NGO**, it should include the **address of the institution** and the **names and signatures** of its legal representatives.
* If the communication is from a State Party, the **names and signature of the State representative**, together with the national seal would be required.
* Each communication should **describe the violation** of human and/or peoples' rights that took place, indicate the date, time (if possible), and place where it occurred. It should also **identify the State** concerned.
* The communication should also include the victims' names (even if the latter wish to remain anonymous, in which case, this fact should be stated), and if possible, the names of any authority familiar with the facts of the case.
* It should also provide information indicating that all **domestic legal remedies have been exhausted**. If all remedies were not exhausted, the communication should indicate the reasons why it was not possible to do so.
* The complaint should also indicate whether the communication has been or is being considered before any **other international human rights body**, for instance, the UN Human Rights Committee.

☒ **Communications not issued by States**

Communications not issued by States must include the following information:

A. Complainant(s) (Please indicate whether you are acting on your behalf or on behalf of someone else. Also indicate in your communication whether you are an NGO and whether you wish to remain anonymous.)
- Name
- Age
- Nationality
- Occupation and/or Profession
- Address
- Telephone/Fax no

B. Government accused of the Violation (Please make sure it is a State Party to the African Charter.)

C. Facts constituting alleged violation (Explain in as much a factual detail as possible what happened, specifying place, time and dates of the violation.)

D. Urgency of the case (Is it a case which could result in loss of life/lives or serious bodily harm if not addressed immediately? State the nature of the case and why you think it deserves immediate action from the Commission.)

E. Provisions of the Charter alleged to have been violated (If you are unsure of the specific articles, please do not mention any.)

F. Names and titles of government authorities who committed the violation (If it is a government institution please give the name of the institution as well as that of the head.)

G. Witness to the violation (Include addresses and if possible telephone numbers of witnesses.)

H. Documentary proofs of the violation (Attach e.g. letters, legal documents, photos, autopsies, tape recordings etc., to show proof of the violation.)

I. Domestic legal remedies pursued (Also indicate for example, the courts you've been to, attach copies of court judgments, writs of habeas corpus etc.)

J. Other international avenues (State whether the case has already been decided or is being heard by some other international human rights body; specify this body and indicate the stage at which the case has reached.)

☒ **Contact information**

African Commission on Human & Peoples' Rights
Secretary/Chairman of the Commission
31, Bijilo Annex Layout
Kombo North District
Western Region
P. O. Box 673
Banjul
Gambia
Tel: (220) 441 05 05/441 05 06
Fax: (220) 441 05 04
E-mail: achpr@achpr.org
Website: http://www.achpr.org

☒ **Situations of serious or massive violations of human rights**

When the Commission considers that one or more communications relate to a series of serious or massive human rights violations, it shall bring the matter to the attention of the Assembly of Heads of State and Government of the African Union and the Peace and Security Council. The Commission may refer the matter to the African Human Rights Court (Rule 84 of Rules of Procedure, see below).

16.2.2 Advantages and disadvantages of submitting a communication to the African Commission

ADVANTAGES	• Victims can remain anonymous under this procedure. • NGOs and individuals can make oral representations before the Commission if they hold observer status. • The Commission may issue provisional measures to prevent irreparable harm to the victim(s) of the alleged violations. • The process is not reliant upon co-operation with the State. If the State

	refuses to participate, the Commission has the power to proceed based on the evidence available or to seek information from alternative third party sources. • Given that it is a regional body it may place additional political pressure on Nigeria to act.
DISADVANTAGES	• The African Commission will only act on communications received from individuals or NGOs if requested to do so by a majority of its members. • Recommendations by the African Commission only become binding if they are adopted by the African Union Assembly of Heads of State and Government. • There is no possibility of obtaining reparations for human rights violations for individual victims. • Although the recommendations are binding, there is no effective enforcement mechanism apart from political pressure by the OAU. • The process is heavily politicised and the outcome is highly dependent on other OAU member States.

16.2.3 Participation of NGOs in the procedures by the African Commission

Non-Governmental Organisations (NGOs) with observer status may participate in the procedures of the African Commission. NGOs may apply for observer status which may be granted by the African Commission in accordance with the 1999 Resolution on the Criteria for Granting and Maintaining Observer Status with the African Commission on Human and Peoples' Rights to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights (ACHPR/Res.33 (XXV) 99).

Criteria for the granting of and for maintaining observer status with the African Commission

All NGOs applying for observer status with the African Commission must submit an application to the Secretariat of the Commission, with a view to showing their willingness and capability to work towards the realisation of the objectives of the African Charter on Human and Peoples' Rights.

All organisations applying for observer status must:

* Have objectives and activities in consonance with the fundamental principles and objectives enunciated in the OAU Charter and in the African Charter on Human and Peoples' Rights;
* Be organisations working in the field of human rights;
* Declare their financial resources.

In order to apply for observer status, an organisation must provide the following documents:

* A written application addressed to the Secretariat stating its intentions, at least three months prior to the Ordinary Session of the Commission which shall decide on the application, in order to give the Secretariat sufficient time in which to process the application;
* Its statutes, proof of its legal existence, a list of its members, its constituent organs, its sources of funding, its last financial statement, as well as a statement on its activities.

* The statement of activities must cover the past and present activities of the organisation, its plan of action and any other information that may help to determine the identity of the organisation, its purpose and objectives, as well as its field of activities.

No application for observer status is put forward for examination by the African Commission without having been previously processed by the Secretariat. The African Commission's Bureau will then designate a rapporteur to examine the dossiers and the applicant organisation will be notified of the Commission's decision without delay.

Observer status may be suspended or withdrawn from any organisation that does not fulfil the criteria, after deliberation by the Commission.

Participation of observers in proceedings of the African Commission

* All observers are invited to be present at the opening and closing sessions of all sessions of the African Commission;
* An observer accredited by the Commission shall not participate in its proceedings in any manner other than as provided for in the Rules of Procedure governing the conduct of sessions of the African Commission;
* All observers have access to the documents of the Commission subject to the condition that such documents:(i) are not confidential, and (ii) deal with issues that are relevant to their interests;
* The distribution of general information documents of the African Commission shall be free of charge; the distribution of specialised documents shall be on a paid-for basis, except where reciprocal arrangements are in place;
* Observers may be invited to be present at closed sessions dealing with issues of particular interest to them;
* Observers may be authorised by the Chairperson of the African Commission to make a statement on an issue that concerns them, subject to the text of the statement having been provided, with sufficient lead-time, to the Chairperson of the Commission through the Secretary to the Commission.
* The Chairperson of the Commission may give the floor to observers to respond to questions directed at them by participants.
* Observers may request to have issues of particular interest to them included in the provisional agenda of the African Commission, in accordance with the provisions of the Rules of Procedure.

Relations between the African Commission and observers

* Organisations enjoying observer status shall undertake to establish close relations of co-operation with the African Commission and to engage in regular consultations with it on all matters of common interest. Administrative arrangements shall be made, whenever necessary, to determine the modalities of this co-operation;
* NGOs enjoying observer status shall present their activity reports to the Commission every two years;
* The Commission reserves the right to take the following measures against NGOs that are in default of their obligations: non-participation in sessions; denial of documents and information; denial of the opportunity to propose items to be included in the Commission's agenda, and of participating in its proceedings.

16.3 African Court on Human and People's Rights

The African Court on Human and Peoples' Rights was established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights (African Human Rights Court). The Court's mission is to complement and reinforce the functions of the Commission in promoting and protecting human and peoples' rights, freedoms and duties in African Union

Member States. The Court is composed of 11 judges, and nationals of Member States of the African Union elected in an individual capacity by the Assembly of Heads of State and Government of the OAU for a renewable mandate of six years.

The Court started its operation in Addis Ababa, Ethiopia in November 2006, but moved to Arusha, Tanzania in August 2007.

The African Human Rights Court has the following jurisdiction:

- ☒ **Contentious jurisdiction**

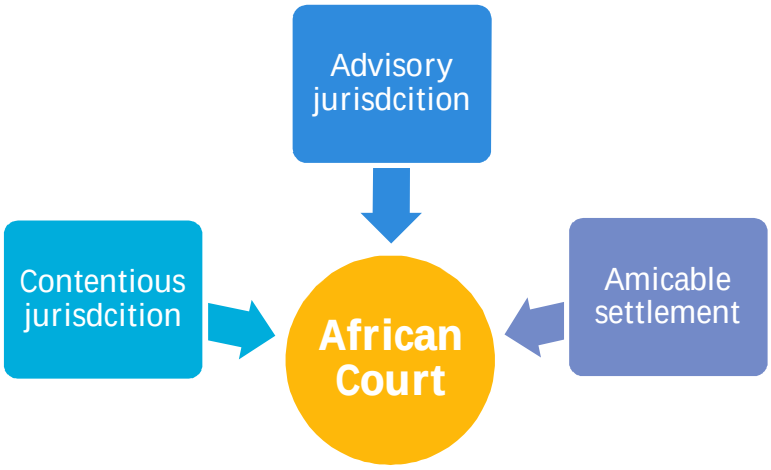
The Court has jurisdiction to deal with all cases and disputes submitted to it concerning the interpretation and application of the African Charter, the Court's Protocol and any other relevant human rights instrument ratified by the States concerned (Article 3 of the Protocol).

- ☒ **Advisory jurisdiction**

At the request of a Member State of the OAU, any organ of the OAU, or any African organisation recognised by the OAU, the Court may provide an opinion on any legal matter relating to the Charter or any other relevant human rights instruments, provided that the subject matter of the opinion is not related to a matter being examined by the African Commission.

- ☒ **Amicable settlement**

The Court has jurisdiction to promote amicable settlement in cases pending before it in accordance with the provisions of the Charter.



16.3.1 Contentious jurisdiction

Only certain bodies are able to invoke the African Human Rights Court's contentious jurisdiction:

* African Union States which are parties to the Protocol;
* The African Commission;
* African inter-governmental organisations (Article 5 of the Protocol).

The capacity of individuals and NGOs to bring a complaint against a State depends both on a special declaration by the State party to the Protocol from which they come from allowing such direct applications, and on the discretion of the Court (Articles 5 and 34). Only NGOs with observer status at the African Commission are considered eligible.

The admissibility criteria for the African Human Rights Court are the same as those for the African Commission (Article 6 of the Protocol). That is, the author's names must be provided; the complaint

must not be based on media articles, the author must exhaust local remedies unless these are unduly prolonged; and the dispute must not have been submitted to another international dispute settlement mechanism (Article 56 African Charter). The Court may order provisional measures in cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons (Article 27(2) of the Protocol).

Free legal representation may be provided where the interests of justice so require (**Article 10(2) of the Protocol**).

Under Rule 31 of the Rules of the Court, the Court may, in the interests of justice and within the limits of the financial resources available, decide to provide free legal representation and/or legal assistance to any party.

Unlike the African Commission, all hearings before the African Human Rights Court generally take place in public (Article 10 of the Protocol). However, the Court may, on its own initiative or at the request of a party, hold its hearings in closed session if, in its opinion, it is in the interests of public morality, safety or public order to do so. The parties or their legal representatives shall be permitted to be present and heard *in camera* (Rule 43 of the Rules of the Court).

The Court also has the power to issue binding decisions and order specific remedies, including compensation (Article 27(1) of the Protocol). In particular, if the Court finds that there has been a violation of a human or peoples' right, it shall make an appropriate order to remedy the violation, including the payment of fair compensation or reparation.

The Court gives its judgment within 90 days of having completed its deliberations. The judgments of the Court are final and are not subject to appeal (Article 28 of the Protocol). However, where new evidence comes to light which was not within the knowledge of a party at the time the judgment was delivered, a party may apply for the judgment to be reviewed. The Court may also interpret its own decisions.

Seizure of the Court by the African Commission

If the African Commission has taken a decision with respect to a communication submitted by an individual or an NGO, and considers that the State has not complied or is unwilling to comply with its recommendations within the prescribed period, it may submit the communication to the African Human Rights Court and inform the parties accordingly (Rule 118(1) of the Rules of Procedure).

The African Commission may also submit a communication to the African Human Rights Court against a State party if a situation that, in its view, constitutes a serious or massive violation of human rights has come to its attention (Rule 118(3) of the Rules of Procedure). Additionally, the Commission may seize the Court at any stage of the examination of a communication if it deems it necessary to do so (Rule 118(4) of the Rules of Procedure).

16.3.2 Advantages and disadvantages of bringing a case before the African Human Rights Court

ADVANTAGES	• The claim can be based on any international or African legal document that the State is a party to. • The Court proceedings are conducted in public and are therefore high profile. • When the Court finds that there has been a violation of human and peoples' rights, it will issue appropriate orders to remedy the violation, including the payment of fair compensation or reparation.

	• In cases of extreme gravity and urgency, and when necessary to avoid irreparable harm to persons, the Court can adopt the necessary provisional measures. • The Court may provide free legal representation and/or legal assistance to any party. • The Court is relatively prompt and is required to give its judgment within ninety days of having completed its deliberations. The Court's judgment is final and not subject to appeal.
DISADVANTAGES	• The Court has only issued one decision on a human rights claim since its inception (in relation to Senegal) and one order for provisional measures (in relation to Libya). There are four applications currently pending before the Court. • As the African Human Rights Court's proceedings are public, this may have confidentiality implications for children unless the Court decides to hold the hearing *in camera*. • An individual or an NGO with observer status before the African Commission can only make a complaint to the African Human Rights Court if the State concerned has lodged a declaration giving permission for this (Article 5 and 34). Since Nigeria has not lodged such a declaration, individuals and NGOs may not directly submit a complaint to the African Human Rights Court and are therefore reliant on the African Commission lodging a complaint to the Court on their behalf.

16.4 Court of Justice of the African Union

Article 19 of the Protocol of the Court of Justice of the African Union provides that African Court of Justice has competence over all disputes and applications referred to it in accordance with the Constitutive Act of the African Union and this Protocol which relate to:

* The interpretation and application of the Constitutive Act of the African Union;
* The interpretation, application or validity of African Union treaties and all subsidiary legal instruments adopted within the framework of the African Union;
* Any question of international law;
* All acts, decisions, regulations and directives of the organs of the African Union;
* All matters specifically provided for in any other agreements that States parties may conclude among themselves or with the Union and which confer jurisdiction on the Court;
* The existence of any fact which, if established, would constitute a breach of an obligation owed to a State party or to the African Union;
* The nature or extent of the reparation to be made for the breach of an obligation.

The Assembly of the African Union may confer on the Court power to assume jurisdiction over any dispute other than those referred to in this Article.

The Court delivers its judgments by a majority of the judges present (Article 35). Judgments are final and binding on the parties and in respect of that particular case (Article 37). States parties are obliged to comply with the judgment in any dispute to which they are parties within the time stipulated by the Court and shall guarantee its execution (Article 51).

Article 52 of the Protocol provides that if a party fails to comply with a judgment, the Court may, upon application by either party, refer the matter to the Assembly, which may decide upon measures to be taken to give effect to the judgment, including sanctions. The African Court of Justice submits a report on its work during the previous year to each ordinary session of the Assembly of Heads of State and Government of the African Union (Assembly). The report must specify, in particular, the cases in which a State has not complied with the Court's judgment (Article 53).

The Court of Justice may also give an advisory opinion on any legal question at the request of the Assembly, the Parliament, the Executive Council, the Peace and Security Council, the Economic, Social and Cultural Council of the African Union, any of the Financial Institutions, a Regional Economic Community or such other organs of the African Union as may be authorized by the Assembly. A request for an advisory opinion must be in writing and contain an exact statement of the question upon which the opinion is required, accompanied by all relevant documents.

16.5 The African Court of Justice and Human Rights

The African Human Rights Court will eventually be merged with the African Court of Justice of the African Union, which was designed to resolve inter-state disputes.

The new joint court will be the main judicial organ of the African Union and it will be named the **African Court of Justice and Human Rights**. This merger is designed to alleviate the proliferation of African Union organs and thereby to reduce the strain on resources within the African system.

The Protocol on the Statute of the African Court of Justice and Human Rights and the Statute annexed to it was adopted on 1 July 2008. The Protocol and the Statute will enter into force thirty days after the deposit of the instruments of ratification by 15 Member States.

The Statute as it is presently drafted indicates that the new Court will operate in a very similar fashion to the African Human Rights Court. Article 28 of the Statute specifies that the Court will have jurisdiction over cases relating to the interpretation and application of the African Charter and the Charter on the Rights and Welfare of the Child and any other legal instruments relating to human rights which have been ratified by the State parties. Individuals and NGOs accredited to the African Union or one of its organs will be able to submit human rights cases to the Court where States which have made a declaration to that effect under Article 8 of the Protocol to the Statute (Article 30 of the Statute).

Judgements will be rendered within 90 days of the completion of deliberations (Article 43 of the Statute) and the Executive Council will monitor the execution of the judgments. The Court has the power to order compensation for violations of human rights (Article 45 of the Statute). The decision of the Court is final and binding on the parties. Failure to comply with the judgment are referred to the Assembly which can impose sanctions for such a failure (Article 46 of the Statute).

16.6 Economic Community of West African States

ECOWAS is a regional group of 15 countries that was created in 1975 to replace the Customs Union of West African States originally created in 1959 to redistribute customs duties collected by the coastal States of West Africa. The Treaty on the Economic Community of West African States was revised at the Cotonou Summit of July 1993 to replace the inexistent Tribunal originally envisioned

with an Economic Community of West African States Community Court of Justice (ECOWAS Community Court).

The Revised Treaty of the Economic Community of West African States (Revised ECOWAS Treaty), guarantees, among other things, the recognition, promotion and protection of human and people's rights in accordance with the African Charter on Human and Peoples' Rights (Article 4).

> **Article 4: Fundamental principles**
>
> *"The High Contracting Parties, in pursuit of the objective stated in Article 3 of this Treaty, solemnly affirm and declare their adherence to the following principles:*
>
> *[…]*
>
> *g. recognition promotion and protection of human and peoples' rights in accordance with the provisions of the African Charter on Human and Peoples' Rights; …"*

The Revised Treaty entered into force in 1995 and was signed by Nigeria on 24 July 1993.

Sanctions may be imposed for non-compliance with the Revised ECOWAS Treaty (Article 77). These sanctions may include:

* Suspension of new Community loans or assistance;
* Suspension of disbursement on on-going Community projects or assistance programmes;
* Exclusion from presenting candidates for statutory and professional posts;
* Suspension of voting rights; and
* Suspension from participating in the activities of the Community.

Sanctions, however, are not imposed if it is shown that the failure to fulfil its obligations is due to causes and circumstances beyond the control of the Member State.

16.6.1 The ECOWAS Community Court of Justice

The ECOWAS Community Court was established as the principal legal organ of ECOWAS pursuant to provisions of Article 6 and 15 of the Revised Treaty of ECOWAS. The judges of the Community Court of Justice were not appointed until 30 January 2001. Protocol A/P.1/7/91 on the Community Court of Justice of 6 July 1991 (Protocol), amended by Supplementary Protocol A/SP.1/01/05 of 19 January 2005 amending certain provisions of the Protocol A/P.1/7/91 (Supplementary Protocol), spells out the organisation, functioning and procedure followed before the ECOWAS Community Court.

The ECOWAS Community Court is composed of seven independent judges, no two of whom may be nationals of the same State. They are selected and appointed by the Authority of Heads of State and Government of ECOWAS, for a renewable five-year term of office (Article 2 of the Supplementary Protocol), from nationals of Member States who are persons of high moral character, and possess the qualification required in their respective countries for appointment to the highest judicial office, or are jurisconsults of recognised competence in international law (Article 3 of the Protocol). The Court is mandated to ensure the observance of law and the principles of equity and human rights in the Community zone.

The ECOWAS Community Court's seat is in Abuja, Nigeria. However, the Court may choose to hold one or more sessions elsewhere in accordance with Article 26(2), which prescribes that "*where*

circumstances or the facts of the case so demand, the Court may decide to sit in the territory of another member State."

Competence of the ECOWAS Community Court

☒ Initial jurisdiction

The initial jurisdiction of the Court was very limited:

* Only the Authority of Heads of State and Government (the executive of the Community comprised of all the Member States) and the Member States acting individually were permitted to initiate contentious cases before the Court (Article 9(2) of the Protocol);
* A Member State was authorised to institute proceedings on behalf of its nationals against another Member State or institution of the Community relating to the interpretation and application of the provisions of the Treaty, after attempts to settle the dispute amicably had failed (Article 9(3) of the Protocol);
* The power to request advisory opinions on the Treaty was limited to the Authority, the Council of Ministers, Member States, the Executive Secretary and other institutions of the Community (Article 10 of the Protocol).

The effect of the restrictive standing requirements for the ECOWAS Community Court rendered it inactive until 2003.

The Court received its first case in 2004. *Olajide Afolabi v. Federal Republic of Nigeria* (ECW/CCJ/JUD/01/04) was filed by an individual businessman against the government of Nigeria for a violation of Community law in the closing of the border with Benin. The ECOWAS Community Court ruled that under the Protocol only member States could institute cases. The Court's ruling began a discussion, headed by the Judges themselves, over the need to amend the Protocol to allow for legal and natural persons to have standing before the Court.

☒ Current jurisdiction

In January 2005, the ECOWAS adopted the Supplementary Protocol to permit individuals to bring suits against member States. The Council took this opportunity to revise the jurisdiction of the Court to include review of violations of human rights in all Member States.

In the area of human rights protection, the Court applies the Treaty, the Conventions, Protocol and Regulations adopted by the community and the general principles of law as set out in Article 38 of the Statute of the International Court of Justice. In the area of human rights protection, the Court applies, *inter alia*, international instruments relating to human rights and ratified by the State or States party to the case.

Article 9 of the Supplementary Protocol specifies the jurisdiction of the ECOWAS Community Court:

> **Article 9: Jurisdiction of the Court**
>
> *1. The Court has competence to adjudicate on any dispute relating to the following:*
>
> *a.) The interpretation and application of the Treaty, Conventions and Protocols of the Community;*
>
> *b.) The interpretation and application of the regulations, directives, decisions and other subsidiary legal instruments adopted by ECOWAS;*

c.) The legality of regulations, directives, decisions and other legal instruments adopted by ECOWAS;

d.) The failure by Member States to honour their obligations under the Treaty, Conventions and Protocols, regulations, directives, or decisions of ECOWAS;

e.) The provisions of the Treaty, Conventions and Protocols, regulations, directives or decisions of ECOWAS Member States;

f.) The Community and its officials; and

g.) The action for damages against a Community institution or an official of the Community for any action or omission in the exercise of official functions.

2. The Court shall have the power to determine any non-contractual liability of the Community and may order the Community to pay damages or make reparation for official acts or omissions of any Community institution or Community officials in the performance of official duties or functions.

3. Any action by or against a Community Institution or any Member of the Community shall be statute barred after three (3) years from the date when the right of action arose.

4. The Court has jurisdiction to determine case of violation of human rights that occur in any Member State.

5. Pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty, the Court shall have the power to act as arbitrator for the purpose of Article 16 of the Treaty.

6. The Court shall have jurisdiction over any matter provided for in an agreement where the parties provide that the Court shall settle disputes arising from the agreement.

7. The Court shall have the powers conferred upon it by the provisions of this Protocol as well as any other powers that may be conferred by subsequent Protocols and Decisions of the Community.

8. The Authority of Heads of State and Government shall have the power to grant the Court the power to adjudicate on any specific dispute that it may refer to the Court other than those specified in this Article.

Accordingly, the ECOWAS Community Court has jurisdiction to determine cases of violations of human rights that occur in any Member State; to adjudicate on any dispute relating to the interpretation and application of the Treaty, Conventions and Protocols of ECOWAS, including the African Charter on Human and Peoples' Rights; and to adjudicate on Member States' failures to honour their obligations under the Treaty, Conventions and Protocol, including the African Charter on Human and Peoples' Rights.

Any disputes relating to the interpretation or the application of the provisions of the Treaty are to be amicably settled through direct agreement. Failing this, either party, any other Member State or the Authority may refer the matter to the ECOWAS Community court of Justice (Article 76 of the Revised Treaty).

The effect of the judgement

Article 15(4) of the Revised Treaty gives binding effect to the judgments of the ECOWAS Community Court:

> *"Judgments of the Court of Justice shall be binding on the Member States, the Institutions of the Community and on individuals and corporate bodies."*

Article 22(3) of the Protocol enjoins all Member States and Institutions of the Community to immediately take all necessary measures to ensure the execution of the decisions of the Court.

Currently there is no right of appeal. However, this issue has been discussed by the ECOWAS Justice Ministers and might be changed in the near future.

On 9 June 2011, the Federal Republic of Nigeria announced that it had designated the Minister of Justice as the competent National Authority responsible for implementing decisions of the ECOWAS Community Court of Justice.

Access to the ECOWAS Community Court

Article 10 of the Supplementary Protocol holds that the ECOWAS Community Court is open to the following:

> *a.) Member States, and unless otherwise provided in a Protocol, the Executive Secretary, where action is brought for failure by a Member state to fulfil an obligation;*
>
> *b.) Member States, the Council of Ministers and the Executive Secretary in proceeding for the determination of the legality of an action in relation to any community text;*
>
> *c.) Individuals and corporate bodies in proceedings from the determination of an act or inaction of a Community official which violates the rights of the individuals or corporate bodies;*
>
> *d.) Individuals on application for relief for violation of their human rights; the submission of application for which shall:*
>
> *i. Not be anonymous; nor*
>
> *ii. Be made whilst the same matter has been instituted before another International Court for adjudication;*
>
> *e.) Staff of any Community institution, after the Staff Member has exhausted all appeal processes available to the officer under the ECOWAS Staff Rules and Regulations;*
>
> *f.) Where in any action before a court of a Member State, an issue arises as to the interpretation of a provision of the Treaty, or the other Protocols or Regulations, the national court may on its own or at the request of any of the parties to the action refer the issue to the Court for interpretation.*

An individual can bring a case before the ECOWAS Community Court for relief for violation of their human rights provided that their application is not anonymous and that the same claim is not being adjudicated by another international court.

The question is whether an individual needs to exhaust domestic remedies before applying to the ECOWAS Community Court. In the 2008 case of *Hadijatou Mani Koroua v. Niger* (ECW/CCJ/JUD/06/08), which is one of the few judgments of the Court to address serious human rights violations (see below), the ECOWAS Community Court ruled that at present there is no requirement to exhaust domestic remedies:

According to Article 10 d. ii of the Supplementary Protocol A/SP.1/01/05 relating to the ECOWAS Court:

> *"Access to the Court is open to the following: (...) d) individuals on application for relief for violation of their human rights; the submission of application for which shall:*
> *i.) not be anonymous; nor*
> *ii.) be made whilst the same matter has been instituted before another International Court for adjudication;"*

The ECOWAS Community Court of Justice underlined that since human rights are inherent to human beings, they are inalienable, imprescriptible and sacred and should therefore not be subject to any form of limitation. In any event, in the case of *Hadijatou Mani*, the applicant was subject to slavery and could not obtain relief or enforcement of her rights in the domestic courts.

The Community Court of Justice has the power to award damages for breaches of rights (as it did in the case *Hadijatou Mani*) but the applicant will be required to justify the quantum of reparations sought in any petition.

Importantly, the Supplementary Protocol also gave national courts of Member States the right to apply to the ECOWAS Court for a ruling on the interpretation of Community law.

How to access the ECOWAS Community Court

* Cases are filed before the ECOWAS Community Court by written applications addressed to the registry.
* Such applications must indicate the name of the applicant, the party against whom the proceedings are being brought, a brief statement of the facts of the case, and the orders being sought by the plaintiff.

Contact information

Community Court of Justice
The ECOWAS
10 Dar es Salaam Crescent,
Off Aminu Kano Crescent,
Wuse II, Abuja, Nigeria.
Tel: (234) (9) 5240781
Fax: (234) (9) 6708210
website: www.courtecowas.org
email : info@courtecowas.org or president@courtecowas.org.

Advantages and disadvantages of bringing a case before the ECOWAS Community Court

ADVANTAGES	* Individuals can take cases directly to the ECOWAS Community Court. * The ECOWAS Community Court does not appear to be under the same pressure and workload as the African Commission or African Court and therefore a judgement may be obtained more speedily through this mechanism. * At present, there is no requirement to exhaust domestic/local remedies before filing a petition. * The ECOWAS Community Court's judgments are binding and may

	result in reparations being ordered for individual victims. * The ECOWAS Community Court has issued adverse judgments against Nigeria in the past and is therefore unlikely to be reticent about doing so again. * In its jurisprudence, the ECOWAS Community Court has granted standing to NGOs to bring cases before the Court. * The ECOWAS Court can sit in the State where the alleged violations occurred, which enables victims, witnesses and civil societies to have better access to proceedings before the Court.
DISADVANTAGES	* To date, there have been very few decisions of the court handed down in relation to alleged violations of human rights. * As there is a requirement for petitions not to be filed anonymously, and in light of the Court's practice of public hearings, it appears that there is no possibility of victim anonymity.

17 International and Regional Standards in Zimbabwe

Human Right Treaty	Date of Ratification/ Accession	Declarations/ Reservations	Recognition of Competence of specific body
ICCPR	13 May 1991	None	Inter-State Complaints (Article 41): Yes Individual Petition (Optional Protocols 1 and 2 ICCPR): No
ICESCR	13 May 1991	None	Optional Protocol ICESCR: No
ICERD	13 May 1991	None	Individual complaint (Article 14): No
CEDAW	13 May 1991	None	Optional Protocol CEDAW: No
CRC	11 Sept 1990		_
ACHPR	1986		

Zimbabwe is not a party to the following core treaties: Optional Protocol 2 ICCPR; CAT; Optional Protocol CAT; Optional Protocol CRC; Optional Protocol Convention on the Rights of Persons with Disabilities (CRPD) and International Convention for the Protection of All Persons from Enforced Disappearance (CED).

Under Zimbabwe's legal system, international treaties that have been acceded to or otherwise ratified are not automatically incorporated into national legislation.

According to Section 111b of the Zimbabwean Constitution,450 international conventions, treaties, and agreements that have been acceded to, concluded, or executed only form part of Zimbabwean law once approved by Parliament and have been incorporated into the law by an Act of Parliament.

Amongst other treaties, neither the ICCPR nor the ACHPR have been incorporated into Zimbabwe's domestic law. However, under international law, international treaties must be observed in good faith by those States which have ratified or acceded to them. Furthermore, a State party may not invoke the provisions of its national law as justification for its failure to implement a treaty.451 In

[450] The Constitution of Zimbabwe (as amended to 1st February 2007).
[451] See Articles 26 and 27 of the Vienna Convention on the Law of Treaties (1969). Although Zimbabwe is not a party to the Vienna Convention on the Law of Treaties, Article26, which refers to the principle of *pacta sunt servanda* stating that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith", is recognised as a

this sense, State Parties are obliged to repeal or amend domestic laws to ensure that they are consistent with international treaties as well as to adopt measures to ensure the implementation of the obligations contained in the treaties to which they are party.

rule of customary international law. Further to Zimbabwe's accession to the ICCPR in 1991, Article49.2 of the ICCPR states that "[f]or each State ratifying the present Covenant or acceding to it ... the present Covenant shall enter into force three months after the date of the deposit of its own instrument of ratification or instrument of accession."

PART 3: Network Toolkit

Only Connect: A Network Building Toolkit

This section of the manual is produced by Brian Brivati, John Smith Memorial Trust.

18 Introduction

Zimbabwe does not need a new network of Electoral Observers, nor does it need international observers telling the national teams what they should and should not be doing in the context of their own political and electoral politics. However, there is valuable detail in the training being offered by the sessions that are currently being run and the group assembled needs to consider how best to work together in the short and medium term to spread best practice and their own experience and knowledge as widely as possible. The Only Connect part of the training process is to consider how this group might best work together in the future as a small network of professionals and how they might cascade their learning and the network approach further amongst the community of electoral observers and other professionals in Zimbabwe.

18.1 Methodology

JSMT believes that change and modernisation happen primarily through the commitment and leadership of a critical mass of individuals. Sustainable changes in society do not take place without a change in the mind-set of key internal actors. Sustainable systemic change can therefore be enhanced by external actors working with individuals to achieve their own objectives in ways that embed globally recognised standards of good governance, human rights and the rule of law in their working practices and world view. JSMT Networks are grounded in "Complexity theory" and "Tipping Point theory". Fifteen years practical experience in running Fellowships in the former Soviet Union underpins and informs the application of these theoretical insights. This experience is recorded in feedback and assessment by Fellows of programmes and in the institutional memory of Trust staff and key stakeholders. How our Fellowships do this has been influenced by learning theories centred on "Double Loop Learning" and "Experiential Learning", which seem to combine and reinforce elements of the theories of social change mentioned and the practice established since 1996.

18.2 Change theories

Complexity theory has developed broad analytical themes and theoretical models of social change that map the nature of human organizations in multi-dimensional patterns. Rather than assuming that single dynamic change agents are capable of altering governing variables, complexity theory suggests that multi-dimensional change interventions over time and spatial fields are how change actually happens. In other words, change takes places when lots of small steps across a range of different fields takes place rather than when a major field changes at one go and in one way. If a state emerging from state socialism wants to become a consolidated liberal democracy, it will not do this by simply changing the basis of property ownership if all other variables - state power, cultural traditions, institutional design, prevailing norms and values - are not also changed. It is only when a critical mass of people in the most important dimensions of their work and attitudes normalize in their allegiance and expectations the values and norms of democratic practice, that change takes place.

There are many competing theories of change but the complexity model seems to fit best with the experience of the FSU transition states since the end of Soviet times. The barriers to change are therefore often attitudinal as well as politically structural. The other factor that needs to be considered, from a complexity theory perspective, is that democratic consolidation is not achievable all at once, in all aspects of the interactions between states and individuals. Progress might well be

quicker in some sectors, for example local government, if there is a critical mass in leadership positions who have chosen the path of modernization because they see it as being in their long term cultural, economic and political interests. This local sector might then continue to operate at a point some way ahead of the central government in terms of transparency and accountability. This is also true in terms of sectors. There might well be a functioning market economy or a relatively well functioning judiciary in key aspects of law, for example the law of contract, operating in what is otherwise an authoritarian system. There is much discussion in the literature of the possibility of spill over from a one functioning system into others. To achieve change across a sector or within an individual sector there needs to be a critical mass of change agents who are in leadership positions and therefore able to set the norms and values of the organizations or have policy and project ideas that, through their implementation, serve as magnets for others. The objective is to reach an institutional tipping point within the sector at which the agents of change and reform out-number the opponents of change, either by a combination of numbers and seniority or in terms of the effectiveness of delivering policy outcomes.

18.3 Learning Theories

The JSMT Fellowship pedagogic methodology grows out of two related theories of learning, which have been tested, adapted and improved over fifteen years and through over 250 completed individual Fellowships. The theories from which the design has grown can be summed up as Experiential Learning Theory (ELT) and Double Loop Learning (DLL).

18.3.1 Experiential Learning Theory (ELT)

There are two different kinds of experiential learning. The first involves focusing learning directly on a deliverable outcome or project rather than on the abstract absorption of information. The second type of experiential learning is achieved through reflection upon everyday experience. People learn in different ways depending on their personality, background, culture and current needs. JSMT's experience has demonstrated that Fellows are usually concerned with concrete experience and, therefore tend to conform to what is sometimes called a Diverging learning style – tending to favour group work, listening and personalized feedback. However, given the cultural variation within the Fellowship region, some Fellows will get more out of an Assimilating leaning style which prefers active experimentation and reflective observation with a preference for workshop and exploring models. Recognizing that learners have different ways of learning, JSMT combines approaches to the presentation of material. The design of JSMT fellowship programs has drawn also on ELT theories of learning space. These put an emphasis on the nature, design and feel of a learning space, the norms and rules that govern the facilitators of the learning experience and also, drawing on situated learning theory, the extent to which learning takes place within the community of learners as much as between the learner and the facilitator.

Double Loop Learning (DLL)

Double Loop Learning assumes that all actors, whether in business or politics, begin with mental maps of how to act. These mental maps are called *theories-in-use*: they are the theories that are implicit in what people do, our view of how the world *really* works.. Theories-in-use influence the way actors both plan and implement projects and the way they then think about what they have done. Actors also describe what they are doing and why they are doing it. These descriptions are known as *espoused theories*: what actors would like others to think lies behind what they do.

These two kinds of thinking interact at three stages of making change happen:

- Governing variables: those dimensions that people are trying to keep within acceptable limits. Any action is likely to impact upon a number of such variables – thus any situation can trigger a trade-off among governing variables. These might also be seen in a political situation as constraints on freedom of action, limits to influence and the boundaries between an individual actor and the wider power relations at work in any particular context.
- Action strategies: the moves and plans used by people to keep their governing values within acceptable range, in essence the means by which actors navigate their course within what

they see as the governing variables. In the political context it is important to stress that the governing variables might not in fact exist but remain barriers to action because they are thought to exist.

- Consequences: what happens as a result of an action. These can be both intended - those the actor believe will result - and unintended. In addition, consequences can be for the self, and/or for others.

The process of learning is about identifying errors and then developing the best means of correcting those errors. Many actors respond to failure by looking for another strategy that would work within the existing governing variables. They might look to past best practice and try to adapt that. They might try what they are already doing but try it for longer or more systematically. Underlying this way of responding is the idea that if only the right strategy can be found then the outcome can be achieved. This is *single-loop learning*.

The alternative response to is to question the governing variables themselves, to bring into the equation of project design a critical scrutiny of what is assumed to be possible and impossible within the confines of the governing variables. This is *double-loop learning*. Such learning may then lead to an alteration in the governing variables and, thus, a shift in the way in which strategies and consequences are framed or more often in a political context it might reveal that the governing variables and constraints that were felt to exist, did not in fact exist.

The overall aim of Fellowship programs, as designed by the JSMT, is to achieve, through a program designed around ELT, a form of double-loop learning experience to enable Fellows to deliver the projects they wish to deliver and become better leaders in the future.

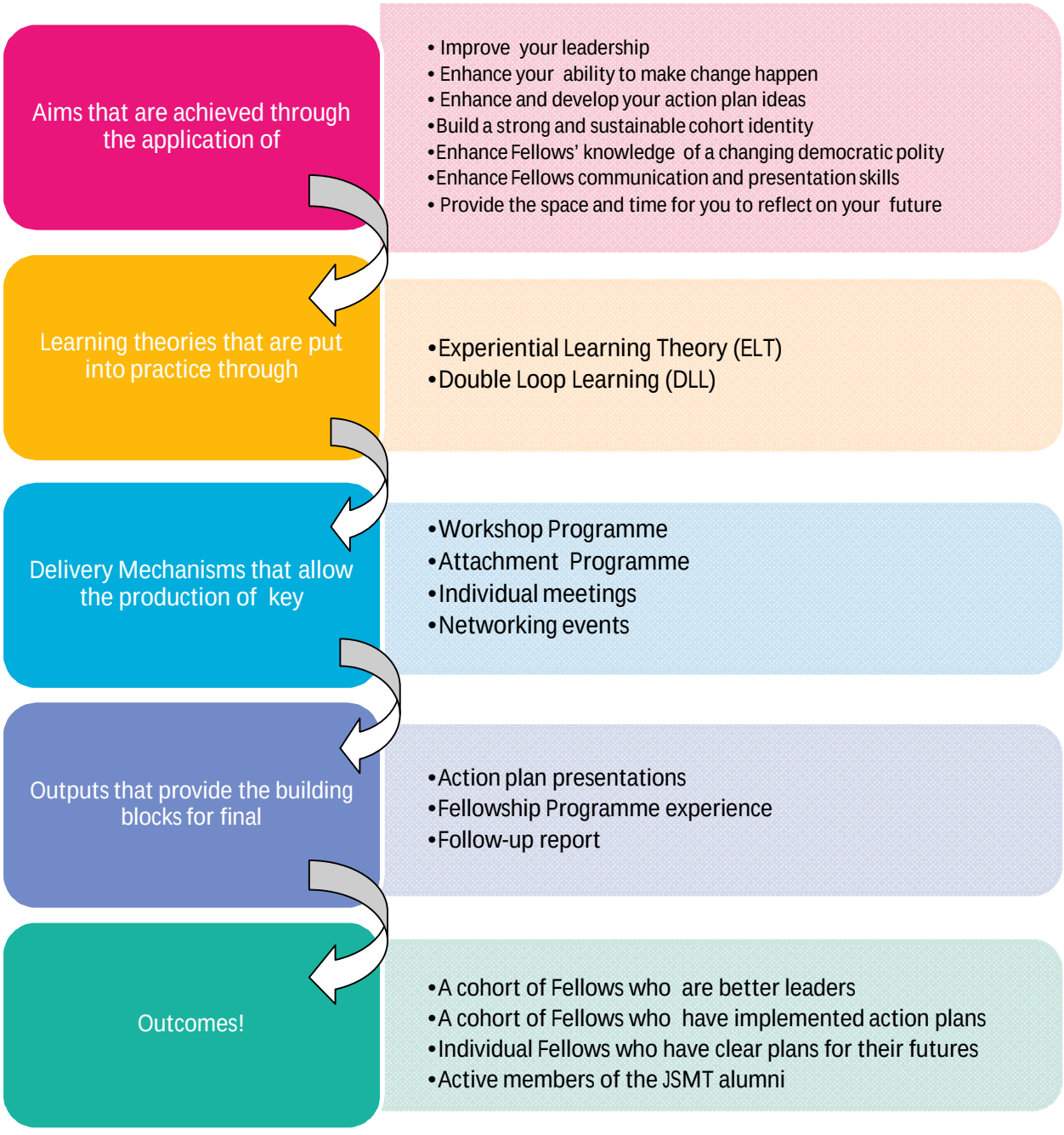
There are certain elements key to the Fellowship experience:

- the basis of the learning is an individual experience which is grounded in a group dynamic
- the fellows are given as many opportunities to lead as can be built into the framework of Fellowship
- the project focus allows a sustained learning experience both in groups and individually as the Fellows design and implement their action plans

The individual mentoring that takes place during the Fellowship program is focused on the fellows as leaders within their own organizations and their communities. It is also reflected on and through the evolution of the Fellows' personal development or action plans. Fellows are focused on an area of policy or a project proposal that they want or have to implement on their return home. From the beginning of the Fellowship through to the final presentation they reflect on this project and how they can improve its design and achieve its delivery. Fellows diagnose their problems with the aid of a range of activities, each designed to reinforce the effect of what went before -- individual tutorial sessions, facilitated group workshops, the attachment experience and the informal learning environment of the Fellowship cohort. They are also asking themselves what they are trying to accomplish, what stands in their way of achieving these objectives, what must they realistically work around and what can they confront.

The different strands of the Fellowship come together in the facilitated group workshops that occur at the beginning and the end of the program. They are less didactic than normal lectures and linked to the delivery of real outcomes in areas in which the facilitator has leadership experience. Or with a focus on a particular area of policy delivery. The style is closest to the master class style of delivery because all facilitators are experienced practitioners from areas of public life, across politics, business and administration, that are linked to the working lives of the Fellows. The focus of a selection of the workshops is based on the case study or "living through" approach. The case study is in part based on the Harvard Business school methodology of case study analysis but because the facilitators are the actual practitioners themselves, the experience is also linked in management

training terms to some of the recreation of past events methodologies. In the final implementation phase, the Fellows must translate their learning into public and personal outcomes to be achieved through the realization of their Action Plans. They are then encouraged to become part of an on-going alumni network and continue to share experiences and spread best practices to new cohorts of fellows. A mapping of the objectives of double loop learning onto the theory and method of ELT demonstrates the underlying logic for the structure and content of JSMT's Fellowship Programme. It looks something like this:



19 Designing your network

19.1 "A Blank Sheet of Paper" workshop

Outcomes

Aims of the workshop

1. To create a strong peer to peer network to support and underpin the continued connection of those taking part in this training;
2. To link and extend this network to interested stakeholders within Zimbabwe and globally;
3. To ensure that Zimbabwean observers and related professionals are represented and heard in global democracy practice forums and that best practice and sources of support are accessible; and
4. To spread knowledge, best practice and risk across a connected, representative and self-sustaining community of observers.

Outputs

1. Online consultation and needs assessment
2. "Blank Sheet of Paper" workshop
3. Timeline and meeting planning for the first year of network
4. Business plan outline for years 2-5 of network

The "Blank Sheet of Paper" workshop combines the methodological approach of JSMT with network creation. It assumes that a group working as a team will achieve more than an individual working in isolation. It seeks to build trust amongst that team by focussing on a shared endeavour in which all participants become stake holders. It works directly with the electoral observers in creating the organisational structure they desire and mapping out actions they want to see happen. It creates a cohort identity that is based on shared experience and trust. Finally, it aims at a double loop learning experience within the group to identify what is really possible and doable safely in the political context faced and does not waste time and resources on actions, structures and outputs that will not contribute to free and fair elections.

Programme

There are different elements to the Blank Sheet of Paper workshop. These are made up of a series of sessions and some thinking and activity that occurs outside the sessions.

19.2 Learning Space

The workshop requires a large space with movable furniture, natural light, flip charts and preferably data projection. The Workshop is divided into the following sessions:

Session 1: Ice breaking, team building, brain storming

* Creating the first sheets of paper based on what we already know
* Working together to agree on what we do not know and what our community of electoral observers need to know more about

Exercise based on network construction – the participants suggest elements and parts, functions and roles that need to be fulfilled in building the electoral observers network, pool knowledge of what is already in place; discuss the risks and challenges of creating and running the network.

Session 2: Models, ideas, structures, and examples arising from session 1

* What do we want to do?

* How does our model relate to other models?

Compare our model to existing network models and examples then structure and organise ideas from what our group wants and relate this to best practice elsewhere. This session should also focus on the content of network activity, in part this means doing a self-reflective needs assessment and what the electoral observation community needs to know more about.

Session 3: Drafting of Structure, Timeline and meeting planning for first year of network

* Blueprints for training programmes
* Election of officers
* Definitions of roles and responsibilities
* Management and development of network
* Physical and online reporting and archiving

This is a detailed working session in which breakout groups assume responsibility for mapping out the elements listed above, these are then presented to the rest of the group, pooled and re-drafted in light of plenary debate.

Session 4: Drafting of Business plan outline for years 2-5 of network

Depending on the dynamic of the group and the amount of detail done in Session 3, this might naturally arise from existing work or might be a different kind of discussion. In Session 3 and 4, it is the double loop learning that will be very much to the forefront of the debate and will require an open and honest discussion of what is possible.

Session 5: Presentation back – Your Plan

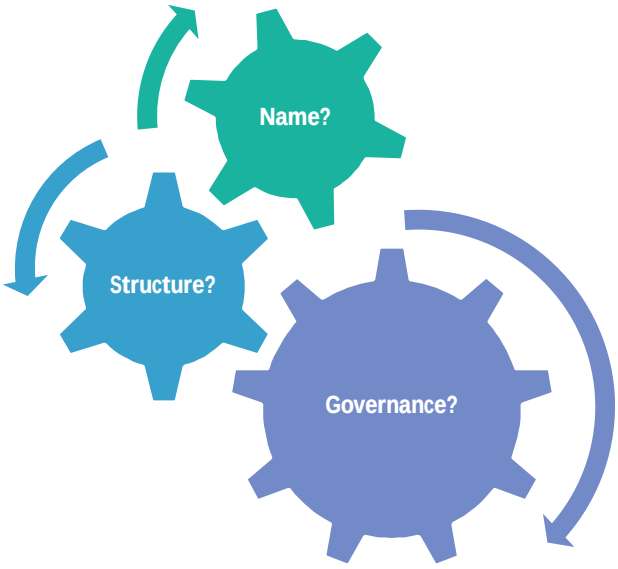
Outline of the organisation you want to create presented back to you by the facilitator.

19.3 Map of the "Blank Sheet of Paper" workshop

19.4 Decision making process of network creation

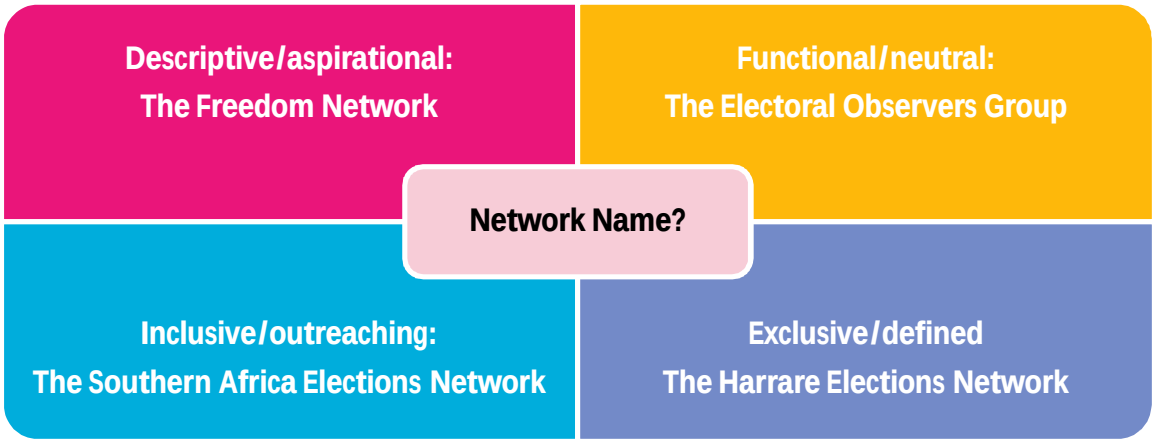
Choice

There are a set of interconnected decisions you need to make in designing your network. The decisions that you make about these things can determine the ethos of network:

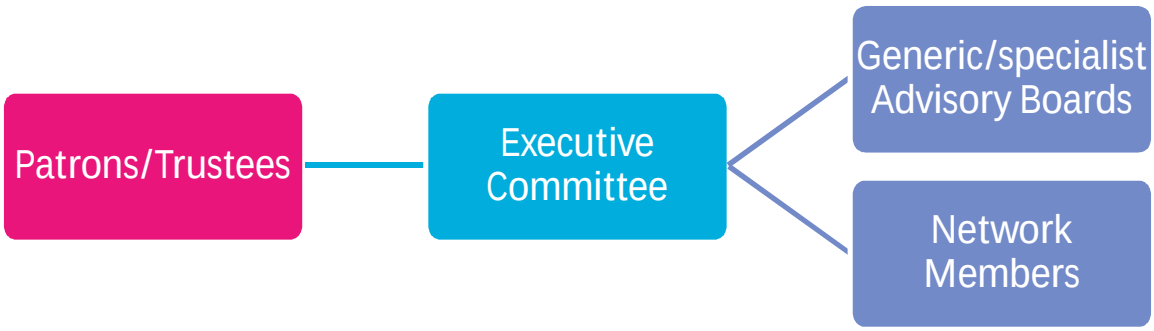


Key Issues to consider:

* What we call a network represents the calling card we present to others.
* How we structure the network can determine its effectiveness.
* How we govern a network can determine its sustainability, especially if internal disputes arise.

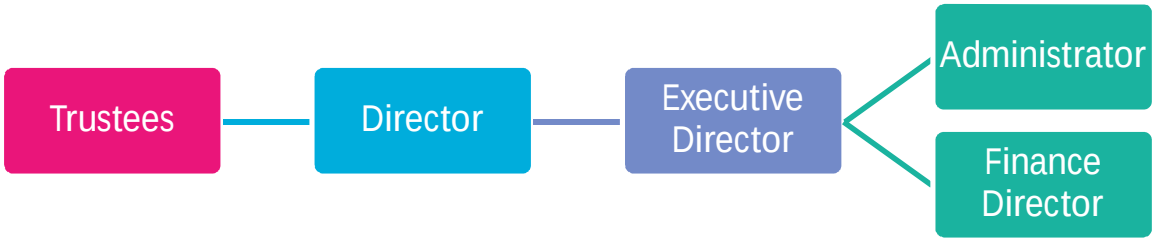


In many ways the name of the network determines the structure and governance.
A classic governance structure would look like this:

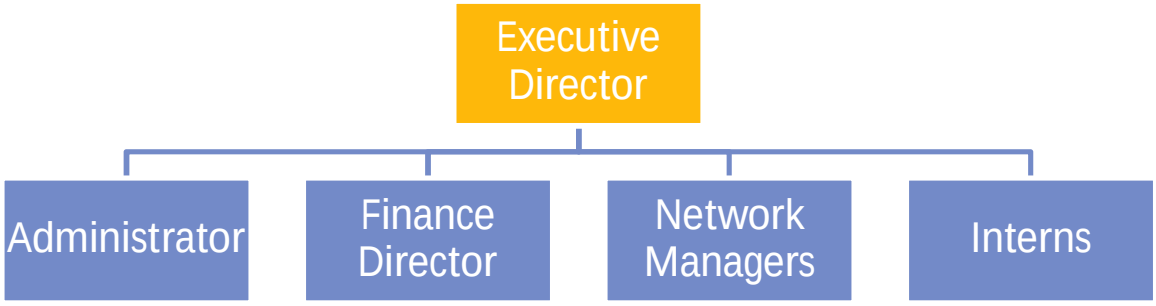


A more modern structure, typical in virtual networks would look more like this:

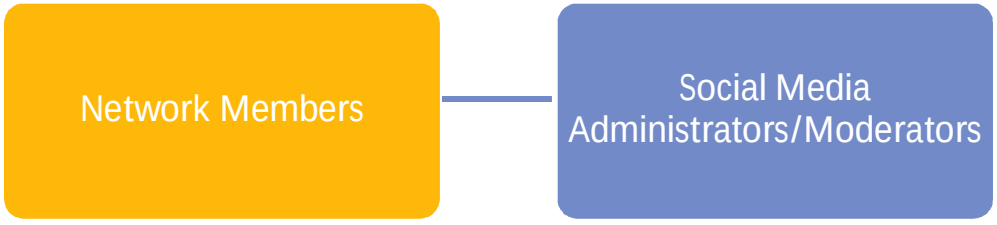
A classic management structure that might look like this:



And a staffing structure of a funded network might look like this:

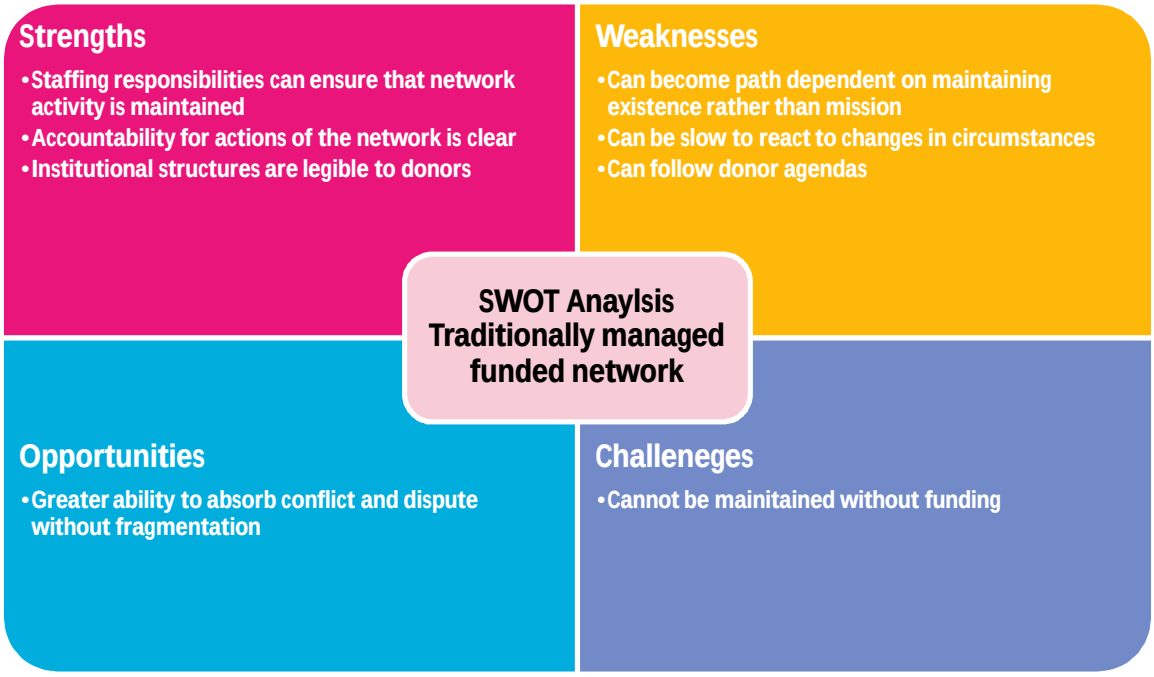


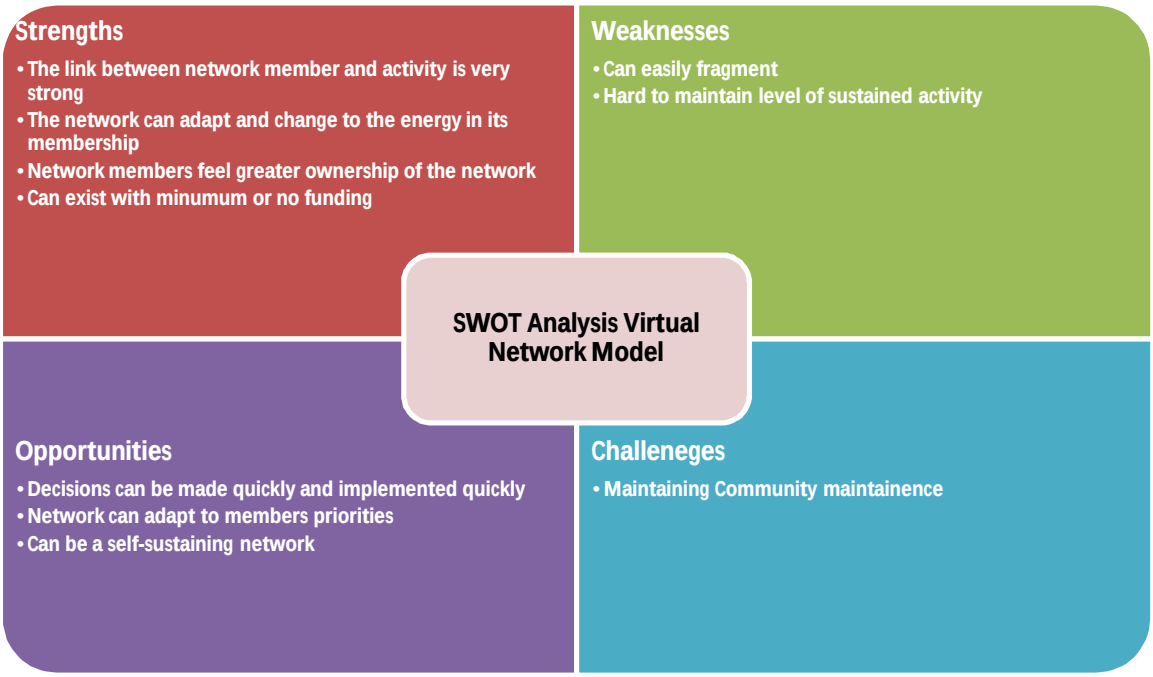
For open and unfunded networks that operate largely through social media the structure of staffing and management are much simpler and look like this:



The most important issue to consider here is the decision making process.

Where do you want power to lie in your network?
Is the mission so clear that it will never change?
Do you want energy devoted to finding funding for the network?
Do you want the network to be self-sustaining?





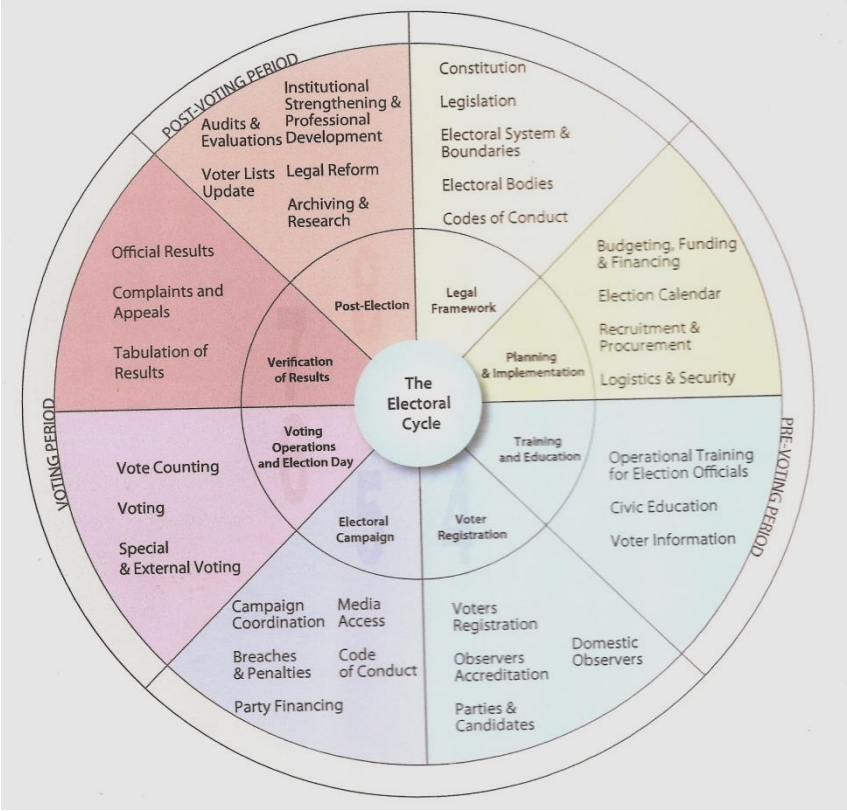
19.5 Why Networks matter in the Electoral Observation Field

The importance of building networks in the national electoral observation field is illustrated in the series of readings that follow. This should form the basis for discussion in our sessions together. The first issue is the role of nationally based electoral observers compared to international observers. The arguments on both sides of this question are summed up in the diagram below. Assuming that we agree that national observers matter the second question is why an on-going network in this area? The key to this lies in the EU model for the electoral cycle approach to working on electoral oversight and observation. This is explored in the second extract. In this context there is a need for diverse groups combining different kinds of skills to be working on different dimensions of observation at different points in the electoral cycle.

There are three main models of electoral observation – OSCE model, EU model and the African Union model. There are two main categories of observer – domestic and international. Different

issues arise depending on the model to be adopted and the status of the observers, however the working assumption here will be that the norms of practice of domestic observation will apply but that the EU model of considering the electoral cycle will be explored in the workshop. This relates to the overall picture of the role of electoral observers. The objectives of election observation can be summarized as:

* To ensure to that an independent, impartial, and objective evaluation of the electoral process is conducted.
* The encouragement of the acceptance of election results.
* Encourage participation and build voter confidence in the electoral process.
* Ensure there is integrity of the electoral process, including deterrence and detection of violence, intimidation, and fraud.
* Monitor the protection of all human rights during the election period.
* Monitor facilitates dispute resolution -- particularly as to issues related to the election process.
* Provide indirect support for civic education and the building of a civil society.
* The EU model considers that these objectives should be considered with reference to the overall Electoral Cycle and not merely in campaign and voting period.



Overall questions for the observers to consider are if:

* Freedom of movement, assembly, association, and expression has been respected throughout the election period;
* All parties have conducted their political activities within the law;
* Any political party or special interest group has been subjected to arbitrary and unnecessary restrictions in regard to access to the media or generally in regard to their freedom to communicate their views;
* Parties, candidates, and supporters have enjoyed equal security;
* Voters have been able to cast their ballots freely, without fear or intimidation;

* The secrecy of the ballot has been maintained;
* The overall conduct of the ballot has been such as to avoid fraud and illegality.
* Monitoring elections
* Monitoring the pre-election preparations and campaign period

a. The development of election law and procedures

The process of identification of electoral districts and boundaries should respect the international norm of equal suffrage. Such delimitation should not be designed to dilute or discount the votes of any particular groups or geographic areas.

Fair constituency-delimitation procedures will take into account a range of information, including available demographic information, territorial integrity, geographical distribution, topography, etc. If delimitation is based on census data, the observers should determine whether the census was accurate. Further, polling stations should be distributed so as to guarantee equal access within each constituency.

Electoral laws and procedures should guard against unfair advantage being bestowed upon Government-supported candidates. Provisions concerning candidate qualifications must be clear and must not discriminate against women or particular racial or ethnic groups. Disqualifications should be subject to independent review.

Political parties should not face unreasonable restrictions on participation or campaigning. There should be protection under the law for party names and symbols. Procedures for designation of party agents, for nomination time and place requirements, and for campaign financing should be clearly established by law. In addition, the electoral calendar should provide adequate time for campaigning and public information efforts.

b. Monitoring the electoral administration

Provisions of the law should ensure that an objective, unbiased, independent, and effective administrative structure is in place. Observers should pay careful attention to provisions for appointment, remuneration, duties, powers, qualifications, and reporting structure of electoral staff. The Observer should ask: (1) Is a single line of ultimate authority established?; (2) Is the method of appointment objective and unbiased?; and (3) Is the means of compensation potentially corrupting?

At all levels, staff must have the necessary qualifications to perform well; staff should also be insulated from bias and political pressure. Adequate advance training is imperative for all election officials. All electoral activities, including the decision-making process, the legal process, and the organization of events, should be conducted in a wholly transparent manner. In addition, public consensus should exist on the administrative structure.

c. Monitoring registration

If advance registration of voters is proposed, the process must be carefully constructed to ensure fairness and effectiveness of provisions concerning elector qualifications, residence requirements, election lists, registers, and the means provided for challenging those documents. Voter lists should be available to interested parties. If no registration is to take place in advance of polling, alternative measures for the prevention of double-voting (for example, the use of indelible ink) and of voting by unqualified persons must be put in place.

Disqualifying factors must not represent impermissible discrimination, and should be limited so as to provide the maximum reasonable enfranchisement of the people. Procedures for registration should accommodate broad participation, and should not create unnecessary technical barriers to participation by otherwise qualified persons.

d. Monitoring civic education
Funding and administration should be provided for objective, non-partisan voter education and information campaigns. The voter education campaign should be based upon the voting experience of the population. The public should be well informed as to where, when, and how to vote. The public should also be educated as to why voting is important.

Literature should be widely available and should be published in the various national languages to help ensure the meaningful participation of all eligible voters. Voter education should encourage participation by all, including members of ethnic groups and women. Multimedia methods should be employed to provide effective civic education to people with various levels of literacy. Voter education campaigns should extend throughout the territory of the country, including rural and outlying areas.

e. Monitoring the media
Arrangements for fair media access by candidates and parties are especially important where the major information media are Government-controlled.

Media regulations should provide for safeguards against political censorship, unfair Government advantage, and unequal access during the campaign period. Fair media access implies not only equality of time and space allotted, but also attention to the hour of broadcasting and the placement of printed advertisements. Observers should also try to determine if broad agreement exists on the media regulation system.

Observers serving as election observers should monitor both national and local media. Monitoring political broadcasts, broadcast civic education programmes, and allocation of time to various political parties permits an evaluation of participants' access to the political process.

f. Monitoring the vote
Observers should try to cover as many polling stations as possible on Election Day. Observers should pay particular attention to observance of the following principles.

Free and fair elections should be guided by detailed provisions regarding the form of ballots, the design of ballot boxes and voting compartments, and the manner of polling. These provisions should protect the process from fraudulent practices and should respect the secrecy of the vote.

Ballots should be worded clearly and contain information that is identical in all native languages. To avoid fraud and to give each participant an equal chance, however, the positions of candidate and party names should be rotated on the ballot. Further, the ballot form should take into account various levels of literacy in the country. Proxy and absentee voting provisions should be designed to encourage the broadest possible participation, without compromising electoral security. Voters with special needs (such as the disabled, elderly, students, conscripts, workers, foreign service personnel, and prisoners who have retained voting rights) should be accommodated, without compromising electoral security.

Sufficient quantities of voting materials should be available at each polling place. Polling personnel should have clear guidance in admitting and identifying qualified voters. The questions that are put to the voters should be limited by statute. Further, Observers should watch for evidence of voter intimidation or discriminatory treatment of voters.

g. Monitoring the count
It is especially important for Observers to be present at the closing of the polls and the counting of the ballots. Counting should be open to official observation by concerned parties, including national and international observers. All issued, unissued, or damaged ballot papers must be systematically accounted for. The processes for counting votes, verification, reporting of results, and retention of

official materials must be secure and fair. Recount procedures should be available in case of questionable results. Ideally, alternative, independent verification procedures such as parallel vote tabulation will be in place.

Observers should determine whether individuals who are denied voting rights have access to substantive redress. The right to challenge election results and for aggrieved parties to seek redress should be provided by law. The petition process should set out the scope of available review, procedures for its initiation, and the powers of the independent judicial body charged with such review.

h. Monitoring results and follow-up

Immediately after the election, the media usually ask observers to pronounce whether or not an election was free and fair.

In this context it seems clear that there is a need for a number of different levels or layers of electoral observation networking. The final extract maps out the global picture of these networks so that participants might consider the connection of their group to the global picture.

20. The need for national observers

NATIONAL OBSERVERS	INTERNATIONAL OBSERVERS
Knowledge:	
Knowledge of local languages and customs, familiarity with political environment. Relatively limited knowledge of electoral matters; limited access to specialized expertise.	Much more limited knowledge of languages and customs, particularly if the observing organization employs electoral rather than country experts, as it seems to be the trend. Substantial knowledge of electoral matters and access to a much larger pool of specialized expertise.
Cost:	
Relatively low cost, and possibility of covering most of the polling stations. No requirements for translation and quite limited requirements for transportation.	Quite expensive, as they involve costs related to international travel, per diem, translators and transportation. This limits the possibility of deploying significant numbers of observers.
Impartiality:	
Usually quite involved (although not necessarily partisan). Usually strongly anti-incumbent. Frequently, national observers networks comprise a large number of organizations, and their degree and characteristics of involvement might be quite different.	Large international organizations like the UN, the OAS, the EU or ODIHR tend to be rather impartial in approaches and selection of observers; International observation missions related to parties, unions or special interest groups are frequently biased in the defense of the interests of their sister organizations in the country being observed.
Voice:	
Activities almost exclusively reported at local level, depending on freedom and pluralism in the national media, and on eventual policies by groups to increase visibility (for instance selecting nationally respected figures for their Boards).	Groups normally have fluid contacts with their specific constituencies (an international organization, a Parliament, a political party, a special interest group) Media repercussions tend to be related with the visibility of the Mission's Head or with the reputation of the observers' group.
Pressure mechanisms:	
Mobilization, mass protests. May be quite important, and there are a few cases where the mobilization resulting from observers' protest has toppled a government.	Direct pressures through embassies, conditionality, incentives through foreign aid. Not too relevant nowadays.

20.1 Organized National Election Observation

Monitoring of the process by organized national groups acting as independent observers is an essential tool for promoting election integrity. These groups span a wide spectrum of non governmental organizations and other civil society groups, including national and local citizen groups, citizen networks, human rights groups, student associations, professional bodies and religious groups.

They collect information from their observer teams, analyse the democratic conduct of the electoral process, assess the quality of the election and publish their findings. The groups can be effective guardians of election integrity, especially in countries undergoing a transition. Their activities foster transparency and accountability on the part of the electoral administration. They thus help to instil public confidence in the integrity of the process. Codes of conduct for observers set ethical and professional standards for observing elections.

An outstanding example of domestic monitoring can be found in the 1997 elections in Kenya, for which civil society organizations trained more than 28,000 national observers. These were posted at nearly 12,600 polling stations and each vote counting station. Their pervasive presence encouraged voter turnout.

In Indonesia, more than 600,000 national observers covered the 1999 elections and helped ensure the integrity of the election results through their close monitoring of the count. However, in the 2004 presidential elections, Indonesia's General Electoral Commission refused to accredit the Independent Monitoring Committee of the Election (KIPP) because that body had published an observation report on the previous legislative elections without approval from the election authorities.

Some countries impose severe restrictions on the recognition of organized national observation. In the 2004 Ukrainian presidential election, the law limited national observation to candidates' representatives. Ukraine's Committee of Voters nonetheless deployed thousands of observers accredited as journalists. In that capacity, however, the observers were not entitled to receive copies of electoral documents or to demand that these documents be made public.

In Ethiopia's 2005 parliamentary elections, the country's electoral management body limited the access of national observers, an action that was challenged before the Supreme Court. The Court ruled against the electoral management body but the decision was not handed down until the day before the election, when it was too late for national observers to effectively carry out their monitoring activities on a large scale.

Benefits of National Observation

In a few cases the presence of international observers is indispensable—for instance, elections in countries requiring a peacekeeping force or undergoing a difficult transition, or where non-partisan civil society groups are virtually non-existent or non-functional. In the long term, however, the forming of domestic groups that are able to monitor their own elections without external assistance is an essential part of democratic development.

National election observers have important advantages over international observers. They can more easily turn out in large numbers, even in the thousands. They know the political culture, language and territory. Consequently, they are capable of seeing many things that may pass unnoticed by foreign observers.

National monitoring groups are often better equipped than international observers to carry out particular types of specialized monitoring efficiently. Examples include verifying the voter registry, monitoring the complaints process, documenting instances of intimidation and human rights violations, and media monitoring. And unlike international observers, national civic organizations have an important role to play in implementing civic education programs and promoting electoral law reform.

Accrediting Observers

Observers and monitors can function more effectively if they are officially accredited by the electoral management or policy-making body. Accreditation gives them access to election sites. Integrity problems may arise if accreditation procedures or requirements are used to limit the number of observers, or to deny access to certain groups of observers or monitors. If the procedure is too time-

consuming and cannot be completed before election day, or if accreditation is selective, the process will lose credibility and the election management body will be accused of having something to hide.

Most electoral systems establish eligibility requirements for observers and monitors in the election laws or procedures. Straightforward and objective requirements can help minimize problems such as discrimination or favouritism that might inadvertently result from subjective accreditation. Some election management bodies add behaviour conditions to the eligibility requirements. These are generally used to exclude persons considered to be anti-democratic. In South Africa, for example, accreditation is provided only to observers who will uphold conditions conducive to a free and fair election, including impartiality and independence from any political party or candidate contesting the election, competent and professional observation, and adherence to the code of conduct for observers.

Security Problems and National Observation

In countries undergoing a difficult transition or in post-conflict societies, national observers may be targets for intimidation or threats. This situation may affect the observers' ability to travel, observe freely and report on the information collected without self-censorship or fear of retribution. For example, one report on the 1998 national elections in Cambodia states, "Threats, intimidation and violence were daunting challenges to the Cambodian observers during this year's election process. None of the groups suggested that their ability to release public statements was compromised by the political environment. They noted, though, that intimidation affected their ability to gather information on the process and that threats coloured the reports … received from observers."

The Electoral Cycle Approach

Together, development agencies and partner counties should plan and implement electoral assistance within a framework of democratic governance by thinking ahead 10 years, rather than reacting to each electoral event as it occurs. In order to achieve this, it is crucial to acknowledge at both the political and operational levels that every time a decision to support an electoral process is made, such a decision entails involvement and commitment to the democratic evolution of the concerned country far beyond the immediate event to be supported. Any decision to keep offering ad hoc electoral support, while this might still be acceptable at the contingent political level, must be accompanied by the consideration that it will not solve the democracy gap in any partner country, but will instead trigger a more staggered process of development cooperation. Indeed, the core mistake of past electoral assistance projects did not rest in the provision of ad hoc short term support, but in the belief that such support would suffice to ensure the sustainability of the following electoral processes, the independence and transparency of the EMB concerned and the consequent democratic development of the partner country.

These considerations, together with the recognition that obstacles to the implementation of long-term assistance remained, led International IDEA and the EC to the development of a visual planning and training tool that could help development agencies, electoral assistance providers and electoral officials in partner countries to understand the cyclical nature of the various challenges faced in electoral processes: this tool has become known as the electoral cycle approach.

Elections are composed of a number of integrated building blocks, with different stakeholders interacting and influencing each other. Electoral components and stakeholders do not stand alone. They are interdependent, and therefore the breakdown of one aspect (for example the collapse of a particular system of voter registration) can negatively impact on every other, including human and financial resources, the availability of supplies, costs, transport, training and security, and thus on the credibility of the election itself. In turn, if an electoral process suffers from low credibility, this is likely to damage the democratisation process of the partner country and block its overall development objectives.

The cyclical approach to electoral processes and electoral assistance was designed by EC and International IDEA electoral specialists working on the first pilot module for training development agencies officials dealing with electoral assistance projects. The concept rapidly gained consensus among practitioners and development agencies agencies. Its conceptualisation was completed with the publication of the EC Methodological Guide on Electoral Assistance, the International IDEA Handbook on Electoral Management Design and the UNDP Electoral Assistance Implementation Guide. This approach has been officially endorsed by the EC and UNDP for every common electoral assistance project through the signing of the "Operational Guidelines for the Implementation of Electoral Assistance" in April 2006. The document recognises that "*electoral assistance has to take stock of all the steps of the electoral cycle and that inter-election periods are as crucial as the build up to the elections themselves, thus requiring regular inter-institutional contact and support activities before, during and after election periods, for the sake of lessons learned and inter-institutional memory aiming at improved electoral processes in beneficiary countries*". These guidelines are already acting as a catalyst in aligning other development agencies with the strategy and features of UNDP-managed electoral assistance projects.

The aim of this "Focus On…" is not to describe the notions underpinning the electoral cycle approach, but rather to describe how it has rapidly become a cornerstone of the efforts to make electoral assistance more effective. Since its first conceptualisation in 2005, there have been several electoral assistance projects which were successfully implemented or designed (Democratic Republic of Congo, East Timor, Togo, Sierra Leone) in accordance with the principles set forth in the Operational Guidelines and informed by the electoral cycle approach. It has also become a model for both planning electoral assistance projects, for developing capacity within national EMBs and for raising awareness among stakeholders.

An adequate understanding of the various components, stages and entry points of an ideal electoral cycle should also be used to better plan and respond to any sudden call for urgent electoral support and clarify from the outset what is achievable and needed in the short-term, as well as identifying what must be the objectives of different, longer-term initiatives. The recognition of the different needs and deliverables related to each stage of the electoral cycle is essential for appropriate programme identification, formulation and implementation, as well as development agencies and stakeholder coordination. The establishment of joint monitoring and quality support mechanisms at top levels between the EC and UNDP for the improvement of the implementation of field operations (through the establishment of the EC-UNDP Joint Task Force on Electoral Assistance, JTF) is a further step towards the consolidation of the principles for making electoral assistance more effective. The focus of the JTF is on identification, formulation, implementation, support and monitoring of all EC-UNDP electoral assistance projects, whenever needed and demanded by EC Delegations and/or UNDP Country Offices. The lessons learned are consolidated and codified so that they can be effectively applied to the implementation of new electoral assistance projects, joint EC-UNDP training activities, and the ACE project in the Practitioners' Network.

The electoral cycle approach has also proved to be a formidable learning tool for electoral officials. Effective electoral assistance requires adequate transfer of know-how, through long-term capacity building that enables electoral administrators to become more professional and to better understand, plan for and implement their core tasks (see paragraph on institutional strengthening and professional development). The electoral cycle approach is a key instrument to facilitate understanding of the interdependence of different electoral activities, helping EMB officials to plan and allocate resources for specific activities in a more timely fashion than in the past. In particular, it places an important emphasis on the post-electoral period as a significant moment of institutional growth, and not just as a vacuum between elections.

Lastly, elections do provide an important and secure entry-point for wider interventions to support democratic governance development, such as the strengthening of civil society, the promotion of human rights (including issues of gender, minorities and indigenous peoples), support to

parliaments, media and political party development, reinforcement of the rule of law and justice, and more opportunities for political dialogue and conflict mitigation. Electoral assistance programmes should thus be designed to be broader than the traditional concept of an electoral assistance plan. The electoral cycle approach is valuable in engaging other stakeholders in the process and providing them with tools to improve their assessment of times and roles for their action. Consequently, financial support should be linked to a longer-term and integrated strategy, which should include the electoral period as one phase of a longer-term democratisation process.

21. Networking by Michelle Maiese[452]

What is Networking?

Networking is a matter of creating useful linkages, both within and among communities, organizations, and societies, in order to mobilize resources and achieve various goals.[453] One author describes it as the "art of building alliances."[454]

Networking occurs at a variety of levels. At the level of neighborhoods and communities, it is a matter of creating reciprocal relationships with other members of society. In many instances, parties meet informally to share a meal or hold a casual meeting. They often share resources, contacts, and information with one another. As a result of these conversations and newly found connections, individuals often find jobs and freelance work, locate apartments, trade services, and develop cooperative strategies.

Some common examples of networking activities include attending trade or professional association meetings, volunteering for community work, visiting with other members of one's social clubs or religious groups, posting messages on mailing lists, and talking to other people in one's community.[455] Networking contacts are often found through friends, extended family, alumni associations, former bosses, and members of the various clubs, religious groups, or other organizations to which one belongs.[456]

Many professionals have increasingly relied on Internet chat rooms, networking websites, and online forums to discuss recent developments in their occupation or field and ask questions of each other. Those looking for employment typically find that networking is one of the most effective ways to find a job. In many villages in less developed parts of the world, establishing social contacts is important for individuals who need to locate money and resources or seek information about where seasonal workers are needed.[457] Networking also allows individuals in many countries to form groups so that they may qualify for loans from banks. Networking is also an important component of community organizing. This requires that diverse members of the population build relationships, share resources, and work together in an organized way for social change. Networking can occur among members of a single organization or social group, among people from many different communities and identity groups, and among organizations.[458] It is a matter of forging connections with other individuals or groups who face similar problems and issues and want to work together toward solutions. These social connections allow individuals, groups, and organizations to find allies, access tools, share practical wisdom, and build collaborative strategies. Networking thus helps those working for social change to share resources and information, devise an agenda, and engage in collective action within their society.[459] For example, local activists and those working in the field of peacemaking will find it useful to make contact with other grassroots organizers to coordinate efforts, learn what has already been done on the issue, and discuss what has and has not worked. Likewise, it is important for organizations to make contacts with other agencies, groups, and individuals that might support their work in direct or indirect ways.

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[452] Maiese, Michelle. "Networking." Beyond Intractability. Eds. Guy Burgess and Heidi Burgess. Conflict Information Consortium, University of Colorado, Boulder. Posted: September 2005 <http://www.beyondintractability.org/bi-essay/networking/>.
[453] Phil Bartle, "Elements of Community Strength," Seattle Community Network, available at: http://www.scn.org/cmp/modules/mea-ele.htm#S Networking
[454] "Networking and Your Job Search," The Riley Guide, March, 2005, available at: http://www.rileyguide.com/network.html
[455] *ibid*
[456] Barbara Reihnhod, "Why Networking?" Monster.com, available at: http://content.monster.com/career/networking/bigdeal/
[457] Judit Katona-Apte, "Coping Strategies of Destitute Women in Bangladesh," United Nations University, available at: http://www.unu.edu/unupress/food/8F103e/8F103E06.htm
[458] "Community Organizer's Guide," Ability Maine, available at: http://www.abilitymaine.org/rosc/cog.html
[459] *ibid*

Like coalition building, networking is grounded in the notion that people who pool their resources have a greater ability to advance their interests. Connections formed through networking can be useful in broadening the research and knowledge base of social campaigns and generating new resources and backing for their efforts. Establishing alliances also makes it easier for organizations to gain help from support groups and allies who support their goals. Insofar as those who coordinate their activities and share resources have a greater chance of success, networking often empowers groups and helps to give people a real voice in decisions that affect them. Through networking, individuals also may develop relationships with third party neutrals as well as adversaries, which ultimately may make it easier for them to come to some sort of agreement in current or future disputes.

Networking at the National and International Levels

In addition to the networking that takes place among individuals at the local level, there are national networks that bring together local organizations, religious groups, community groups, trade unions, and hospitals. The types of networking that commonly take place at the national level are civic engagement and multi-stakeholder participation. Civic engagement is a matter of interaction between civil society organizations and governments so that they can build constructive relationships and bring about social, economic, and political change. Likewise, rapid advances in media, telecommunications, and computer technology have facilitated wide sharing of information among multiple civil society stakeholders. Partnerships among these diverse individuals, groups, and organizations have proven to be an effective way to advance development projects and reduce poverty within communities.[460]

For example, the Nicaraguan Community Movement (MCN) is a national network of community-based organizations that provides training, accompaniment, and legal advice to community groups. Local and national authorities recognize the MCN as a representative voice of civil society.[461] Such civil society networks offer opportunities for increased communication among diverse groups and often give weight to community demands. Often this generates broad public participation and further networking among citizens in local communities.[462]

Networking also plays a key role in peacebuilding efforts and has great potential to strengthen the capacity of the peacebuilding field as a whole. Because a diverse group of people and organizations work in the fields of conflict resolution and peacebuilding, there are often heavy needs for coordination. Involved actors include local governments, international organizations, nongovernmental organizations, development organizations, conflict resolution groups, local peacemakers, and citizens. All of these actors have different backgrounds, cultures, and interests, and in some cases some of them are not even aware of each other's existence.[463]

To remedy this, several European countries have established national platforms on peacebuilding. These networks help to create an infrastructure for an effective system of collaboration and coordination. Their activities include the organization of national meetings and regional consultations in order to allow for information sharing and communication among a wide number of actors. In addition, these networks enable collective lobbying and advocacy activities that can encourage the allocation of public resources to the task of building peace. For example, they can participate in educationaland media activities that increase awareness about the importance of

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[460] "Project Concept: Knowledge Networking for Empowerment and Development," knownetasia.org, The Foundation for Media Alternatives, available at: http://www.fma.ph/knownetasia/project-concept.html

[461] "Bringing Citizen Voice and Client Focus Into Service Delivery: Nicaraguan Community Movement," Institute of Development Studies, University of Sussex, available at: http://www.ids.ac.uk/ids/govern/citizenvoice/pdfs/nicaraguacm.pdf

[462] http://www.fma.ph/knownetasia/project-concept.html

[463] Paul J.M van Tongeren, "The Challenge of Coordination and Networking," in Peacebuilding: A Field Guide, (Boulder, CO: Lynne Reinner Publishers, 2001), 510.

conflict prevention.[464]

At the international level, the European Platform for Conflict Prevention and Transformation is a network of organizations working in the field of conflict prevention and resolution. It aims to include a wide range of participant organizations throughout Europe and to support the establishment of national networks. One of the useful aspects of these national and international platforms is their clearinghouse mandate, which allows for a wide exchange of information. The European Platform has published an international directory that lists 500 conflict management organizations and information about their activities as well. This enables people to know what other actors are doing in which regions so that human rights, peace, development, and humanitarian NGOs can coordinate their efforts. Likewise, the Great Lakes Policy Forum is an international network that involves collaboration among government and nongovernmental officials to discuss sensitive issues and collect early warning signals.[465] The Horn of Africa NGO Network for Development (HANND) is a network of indigenous civil society actors and NGOs in the Horn of Africa, which began networking among themselves in 1997. In March 2000, at a regional meeting in Djibouti, the participants in HANND decided to establish themselves as a legal and formal regional network. This network allows for communication among civil society leaders and allows participants to share useful information about conflict prevention, food security, and capacity development. [From: http://www.hannd.net/]

Increased international networking might allow actors to exchange information about the evaluation of initiatives, lessons learned, and surveys done. As a result, the field as a whole may become stronger, more structured, and less scattered. These networks also have the potential to raise awareness, both among the general public as well as those working in the field, about the scope of conflict resolution activities and infrastructure that is already in place. [466]

In addition, international networking can help to build a global constituency that supports violence prevention, coordinates advocacy and lobbying efforts, and initiates educational and media projects. It is important for peacebuilders to develop partnerships with local people who can provide guidance, feedback, and support.[467] These networks bring together actors who live in specific conflict areas with those who operate from abroad. Local parties can assist with training, help external actors to solve problems, and generate new ideas as fresh challenges emerge. Networking also helps to develop trusting relationships among multiple actors and gives local groups a chance to talk to members of foreign governments and NGOs. For example, through the training of trainers program in Burundi, external trainers networked with local actors to evaluate ideas about training and peacebuilding.

Networking has also played an important role in the realm of research, education, and scholarship. Partnerships and linkages among scholars and institutions allow those in postgraduate and professional communities to share existing knowledge about development and enhance conflict resolution education and research. These initiatives, many of which rely on online learning, seek to bridge some of the knowledge gaps between developed and developing countries. The Internet increasingly offers a powerful and low cost means of international networking so that organizations can share observations and knowledge to profit from each other's wisdom.

For example, the United Nations University's Food and Nutrition Programme for Human and Social Development links up scientists and food and nutrition institutions in Africa, Asia and Latin America. The goal is to disseminate knowledge and support capacity building activities across the globe. Similarly, the aim of the World Forests, Society, and Environment Research Program is to conduct

[464] *ibid.*, 512
[465] *ibid.*, 511. The European Platform has now expanded to become global in scope, forming the Global Partnership for the Prevention of Armed Conflict. (See http://www.gppac.org/ for information.)
[466] *ibid.*, 515
[467] Kent Arnold, "The Challenge of Building Training Capacity: The Center for Conflict Resolution Approach in Burundi," in Peacebuilding: A Field Guide, (Boulder, CO: Lynne Reinner Publishers, 2001), 284.

research on world forests and environment in order to support sustainable forest development and ensure the well-being of local populations.[468] This global research program involves networking among international and national forest research institutes and individual researchers throughout the world. Forums are held to allow for discussion and increase the dissemination of information. This increased collaboration links researchers from developed and developing countries, strengthens the overall research capacity of the field, and allows for more widespread access to research findings.

Why is Networking Important?

Networking is important for a variety of reasons, many of which already have been mentioned above. At both the individual and collective level, networking is a strategy of empowerment. As a result of networking, organizations and individuals are able to apply political pressure at the local and global level in support of their goals. Networking aids in organizing and mobilization, empowers civil society groups, and enables poor and powerless individuals to have a stronger voice in the processes of decision-making.[469] This is because having a strong set of social connectionshelps parties to organize lobbying and advocacy activities at the national, regional, and international level in order to bring about needed social changes. This typically involves challenging adverse laws, restructuring power relations, and bringing about policy changes. Through such joint efforts, parties are often more capable of influencing the future of their communities.

At the international level, networking can also help to unite actors who live in a specific conflict area with those who operate from abroad. Two examples of this type of international coalition are the Horn of Africa Program and the Great Lakes Policy Forum. The Forum involves informal collaboration among government and nongovernmental officials to discuss sensitive issues. It helps to collect early warning signals, develop relationships built on mutual trust among multiple actors, and give local groups a chance to talk to members of foreign governments and NGOs.[470]

Networks also help to unite people at the local level with people at the global level as they work toward their shared goals. For example, Diverse Women for Diversity (DWD) is a network that partners indigenous women with professional lobbyists to "work towards crucial issues that are being decided upon at UN-Conferences on world trade, sustainable agriculture, biotechnology, and biodiversity."[471] The network is increasingly engaged in international negotiations surrounding peacemaking and economic globalization.

In addition, people from diverse backgrounds who have faced a variety of struggles come together to advance their common objectives. This facilitates interaction between people in different parts of the world and allows them to recognize both their differences and their commonality. As a result of networking with others both inside and outside their social groups, disenfranchised members of society can realize and extend their power.

Women Living Under Muslim Law (WLUML), for example, is a network that brings together women from throughout the Muslim world to challenge adverse laws. While these women may live in very different contexts, Muslim laws affect all of them. The joint support of women from a variety of contexts helps to facilitate initiatives against discriminatory laws and policies.[472] Forming such connections with people both inside and outside their immediate social group thus allows less powerful individuals to gain influence within their society.

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[468] "How Can Global Research by WFSE Sustain Forest Development?" The World Forests, Society, and Environment Research Program, United Nations University, available at: http://www.unu.edu/env/forests/forum-satmeet.htm

[469] "Community Building Through Convening," Island County Public Health and Human Services, available at: http://www.islandcounty.net/health/convene.htm#Networking

[470] van tongeren, 517.

[471] Vathsala Aithal, "Empowerment and Global Action of Women: Theory and Practice," Working Papers, Kvinnforsk, University of Tromso, available at: http://www.skk.uit.no/WW99/papers/Aithal-Vathsala.pdf

[472] *ibid*

Because networks offer opportunities for increased communication, they have the potential to become a sort of international civil society out of which can emerge different kinds of strategies and projects. Development Alternatives with Women for New Era (DAWN), for example, is a network of activists, NGO workers, and academics committed to addressing the important issues that face the majority of women in Third World countries. Major aims of this international network are social transformation and empowerment. In many Asian countries, networks among civil society organizations, citizens, and community groups, play an important role in development projects. Networking among multiple stakeholders allows for the sharing of information and knowledge that is important for poverty reduction and economic development. As a result of new advances in media, telecommunications, and computing, there is potential to share this information with a broader audience of development stakeholders.[473] Good networking also helps to build trusting relationships among parties and allows for the sharing of resources so that groups can bring about important social, economic, and political changes. Networking is also an important part of human rights monitoring. Guarding against human rights abuses requires the active sharing of information and cooperation among human rights partners and local actors. To accomplish this task, networks of civil society groups that include NGOs, church groups, women's groups, and youth organizations need to be nurtured. Linkages among human rights monitors and local organizations help to build relationships of trust so that that a greater amount of high-quality information is shared among human rights groups, religious groups, church organizations, trade unions, and hospitals.[474] Regular meetings can be held to allow all of these actors to share information and advice, which can lead to constructive thinking and new solutions.

Networking Abilities

The preceding discussion suggests that networking is an important part of collective action at the local, national, and international levels. It serves to empower individuals, communities, and organizations so that they may achieve their goals. It seems clear, then, that the ability to network effectively is an important skill for people to possess. What sorts of capacities are needed for effective networking?

Strong networkers need to be able to develop rapport with a wide variety of people. Typically they have the respect and trust of their fellow citizens so that others listen to them. They demonstrate sincere concern and curiosity and actively seek out information and knowledge.[475] In addition, they have developed an understanding of how groups and institutions relate to each other and are aware of how different sectors of the community function within the social system. They are outgoing and friendly and stay in contact with other people in the network on an ongoing basis. A good networker should be skilled at calling people "to assembly," have strong listening skills, and be adept at organizing activities.[476]

In addition, they will be proficient at some of the activities that are central to networking. These include collective lobbying, information sharing, coordinated advocacy, and the initiation of innovative educational and media projects. Good communication skills and knowledge about mass media are also helpful.

[473] http://www.fma.ph/knownetasia/project-concept.html
[474] Karen Kenny, "Human Rights Monitoring: How to Do It and Lessons Learned," in *Peacebuilding: A Field Guide*, (Boulder, CO: Lynne Reinner Publishers, 2001),205.
[475] http://www.islandcounty.net/health/convene.htm#Networking
[476] *ibid*

22. What Are Electoral Networks and Why Do they Matter?

Reference Sheet 22: Concept of Transfer Extract[477]

522. Globalization has brought rapid and dynamic changes to organizational management, including electoral administration, and such changes are influencing EMBs to move away from the hierarchical structures and routines of the past. Both at regional and at national level, an increasing number of electoral practitioners are also working together through well-established networks to fi nd solutions to common problems and to build innovations through sustained sharing of ideas, information and experience.

523. Electoral networks foster capacity development among electoral managers and serve as useful forums to address common concerns such as EMB independence, EMB funding, or the use of technology in elections. Electoral managers need no longer operate in isolation from each other and without any external support to improve their knowledge and skills. Electoral networks are important for supporting electoral managers around the world to cope with the rapidity of change in the environments in which elections take place.

National Electoral Networks

524. In the UK, there is a professional network, the Association of Election Administrators (AEA), to which all senior electoral administrators (returning offi cers) belong. The AEA conducts regular training and education for electoral administrators, acts to safeguard their interests, and serves as a network of resources and expertise for its members. It offers professional qualification courses, which are mandatory for appointment to electoral-related positions in UK local authorities, which are governmental EMBs.

525. In the United States, the National Association of State Election Directors and the National Association of Secretaries of State serve as useful forums for electoral managers to 280
Handbook on Electoral Management Design exchange views and improve their capacities and performance. The International Association of Clerks, Recorders, Election Offi cials and Treasurers (IACREOT) holds regular electoral professional development courses for its members, and annual trade shows for electoral-related equipment and supplies. The National Association of Clerks and County Recorders (NACRC), the Election Center, and the National Association of Counties also organize events for local election officials.

526. In Australia, the Electoral Council of Australia, a consultative forum comprising the national and state electoral commissioners and chief electoral officers, meets regularly. Its main objectives are to ensure the quality of the electoral registers for all elections in Australia and to improve Australian electoral administration in general. The Association of Bosnia and Herzegovina Election Officials (AEOBIH) consists of electoral officials from the three entities of Bosnia and Herzegovina and holds conferences, seminars and other consultations to promotedemocratic, open, transparent elections.

Regional EMB Networks

527. During the 1980s and 1990s, cooperation between EMBs at the regional level intensified, and a number of regional associations were established to facilitate and sustain cooperation. The objectives of the early regional electoral associations which were formed in the 1980s were, however, so general as to be little more than a framework pointing to desirable goals with little specific commitment. The Association of Electoral Institutions of Central America and the Caribbean (known as the Tikal Protocol), established in Guatemala in 1985, was a representative body of electoral organizations designed to achieve cooperation, exchange information and facilitate consultation. Its recommendations were not binding on its member organizations. The Association

[477] Extract from http://www.idea.int/publications/emd/index.cfm

of South American Electoral Organizations (the Quito Protocol) was formed in 1989 along similar lines.

528. The Inter-American Union of Electoral Organizations (UNIORE) was established in 1991 to promote cooperation between the electoral organizations and associations created under the Tikal and Quito protocols. It extended the potential scope of cooperation to provide support and assistance, as far as practicable, to member organizations which requested them. The Costa Rica-based Center for Electoral Promotion and Assistance (CAPEL), established in 1983, acts as the executive secretariat of these networks.

529. Although the elements of information exchange, cooperation and consultation still featured prominently in the objectives of associations formed in the 1990s, there was greater focus on broad common goals, such as the promotion of free and fair elections, independent and impartial EMBs, and transparent electoral procedures. Specific common regional goals were emphasized, such as cooperation in the improvement of electoral laws and practices; the promotion of participation by citizens, political contestants and non-partisan NGOs in electoral processes; and the establishment of resource centres for research and information. These associations also placed great emphasis on the development of professional electoral officials with high integrity, a strong sense of public service, knowledge and experience of electoral processes, and a commitment to democratic elections.

530. The associations which typify these new dimensions include:

- the Association of Central and Eastern European Electoral Officials (ACEEEO),
- established in 1991;
- the Association of African Election Authorities (AAEA), established in 1997;
- the Association of Asian Election Authorities (AAEA), established in 1997; and
- the Association of Caribbean Electoral Organizations (ACEO), established in 1998.

531. Other regional networks which came into being around the same time include the Pacific Islands, Australia, New Zealand Electoral Administrators Network (PIANZEA) and the Electoral Commissions' Forum (ECF) of the SADC.

532. Although the mandates of these networks differ in detail, they all aim to promote the free flow of information among election practitioners and to provide electoral assistance to their member EMBs. For example, the objectives of CAPEL are to give technical electoral advice, and to promote free and fair multiparty elections, and the values of democratic culture and of non-discriminatory participation in elections. To achieve its aims, it shall:

- maintain an expert advisory group ready to assist the governments and public bodies of the region on request regarding better ways of conducting electoral processes;
- supply electoral observers, at the request of a member country;
- organize research programmes on the subject of elections, comparative electoral legislation, the transition to democracy, and the strengthening of democratic systems in the Americas;
- organize regional and international meetings and conferences to promote electoral theory and practice, and to evaluate the state and prospects of electoral processes and their effect on democracy;
- organize training courses and seminars for electoral officials in the region; and
- keep up-to-date information on election results in the Americas, form a specialized library on the subject of elections, and prepare, publish and distribute material concerning free, democratic elections.

533. The potential benefits of regional cooperation through associations of electoral organizations are considerable. New EMBs can draw on support and experience from more established electoral authorities, can accelerate their capacity building by exchange of personnel, and may even be able

to borrow electoral materials at relatively short notice. The development of common standards with respect to free and fair elections and the quality of electoral services may have a positive effect on losers accepting election results.

534. The development of EMB networks is constrained in practice by two issues affecting individual EMBs – lack of resources to participate in the association's activities and fear of compromising their perceived independence. Some EMBs shy away from active participation because they fear that dependence on the government for resources for travel, research or other programme activities might compromise their independence. Resource constraints also restrict the activities of the associations themselves, which have to depend mainly on outside funding.

EMB Networks

535. The development of regional associations of electoral organizations and the increasing internationalization of elections through advocacy for international standards for democratic elections led to the establishment of a global forum for discussion of EMB collaboration. The Conference of the Global Electoral Organization (GEO) Network, which was first convened Ottawa in April 1999, is a worldwide meeting of regional associations of electoral officers. GEO conferences have the following objectives:

- to provide an opportunity for associations of electoral officials to link with each other in
- a global professional network;
- to offer organizational and programmatic models for collaboration and cooperative ventures among members and between associations, or with the supporters of electoral governance projects;
- to serve as a forum in which to identify areas of need in electoral governance and programmes which can be developed to respond to those needs; and
- to identify a common agenda for all electoral management bodies around the world.
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536. The ACE Electoral Knowledge Network (<http://www.aceproject.org>), which is a continuation and transformation of the original Administration and Cost of Elections (ACE) Project, is the result of a collaborative effort between International IDEA, EISA, Elections Canada, the Federal Electoral Institute (IFE) of Mexico, IFES, the United Nations Department of Economic and Social Affairs (UNDESA) and the UNDP. The ACE Electoral Knowledge Network is a dynamic online knowledge service that provides comprehensive and authoritative information on elections, promotes networking among election-related professionals and offers capacity development services. It features information on nearly every aspect of elections, with an emphasis on issues of cost, sustainability, professionalism and trust in the electoral process.

Its networking component, the ACE Practitioners' Network, provides access to a network of election professionals from across the globe offering, among other things, professional advisory services online to the global community of users. It encourages professionals to collaborate on common issues and challenges and to generate, share and apply knowledge, help build common methods, and improve the professionalism of those engaged in activities related to credible, sustainable, peaceful and cost-effective elections.

537. The practical operations of the global network may best revolve around the promotion of knowledge and experience gained in the development of electoral procedures, joint research on matters relating to important electoral processes and issues, and the promotion of international discussions on electoral issues with a view to furthering democratic values and governance. A global network is well placed to encourage and facilitate the publication of electoral materials by the various regional associations and to promote the exchange of expertise and the secondment of specialists in technical fields.

538. Various electoral issues can be treated with advantage at the global level, setting the stage for adaptation at the regional or national levels. These issues could include improved cost effectiveness in electoral administration, principles and good practices in electoral management, the effectiveness

and affordability of new electoral technologies, legislative frameworks for elections and referendums, and mechanisms for the resolution of electoral disputes.

Electoral Support Networks

539. In many parts of the world, national or regional electoral support networks have been formed, comprising civil society organizations, such as democracy promotion organizations, media organizations, human rights organizations, women's organizations, religious-based groups and other community-based organizations. Examples include the Zimbabwe Electoral Support Network (ZESN) and the faith-based Peoples Voter Education Network (JPPR) in Indonesia at a national level, and the Asian Network for Free Elections (ANFREL) and the SADC Electoral Support Network at regional levels. While some electoral support networks specialize in election monitoring or observation, many support EMBs in areas such as research on electoral matters, training, and voter education and information. Electoral support networks can be effective partners for EMBs, using links into local communities and access to funds – particularly donor funds in emerging democracies – to augment the skills base of EMBs and to enhance information flows to and from EMBs.

Annex 1

The following is a non-exhaustive list of useful material on elections and prerequisite rights.

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