



DEMOCRACY
REPORTING
INTERNATIONAL

THE
CARTER CENTER



REPORT

STRENGTHENING
INTERNATIONAL LAW
TO SUPPORT
DEMOCRATIC GOVERNANCE
AND GENUINE ELECTIONS

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STRENGTHENING INTERNATIONAL LAW TO SUPPORT DEMOCRATIC GOVERNANCE AND GENUINE ELECTIONS

“[THE] MAIN COMPONENTS OF DEMOCRACY, I.E. THE RIGHT OF THE PEOPLE TO SOVEREIGNTY, INTERNAL SELF-DETERMINATION AND EQUAL PARTICIPATION IN POLITICAL DECISION-MAKING PROCESS TOGETHER WITH THE PROTECTION OF MINORITIES AGAINST TYRANNY OF THE MAJORITY, ARE ALREADY PART OF INTERNATIONAL LAW OF HUMAN RIGHTS.”

Manfred Nowak¹

EXECUTIVE SUMMARY

International law contains a large number of obligations relevant for democratic governance and democratic elections. Contrary to conventional wisdom, these obligations are often detailed and comprehensive. International law guarantees key elements of democratic governance, such as the separation of powers, accountability, rule of law, and transparency. International law also protects key principles of democratic elections such as universal suffrage, secrecy of the vote, the right to vote and be elected, the right to freely assemble and associate, and, importantly, the right to an election that is “genuine.” This is a remarkably positive finding.

Article 25 of the International Covenant on Civil and Political Rights (ICCPR) is the cornerstone of democratic governance and genuine elections in international law. Article 25 explicitly grants the right to take part in the conduct of public affairs and to equal suffrage. Other key elements of democracy derive from article 25, in particular the separation of powers, minimum rights of Parliament, full and effective civilian supervision of the security sector, and transparent and inclusive constitution making processes. The ICCPR and other human rights treaties also guarantee other core elements of a democracy and genuine elections, such as freedoms of association, assembly, and expression, and the independence of the judiciary. Views on individual petitions and General Comments of the United Nations Human Rights Committee (HRC) help interpret relevant norms and provide an authoritative understanding of the obligations States have undertaken to respect democratic governance and genuine elections.

¹ Nowak, CCPR Commentary, 565.

DEMOCRATIC GOVERNANCE

Concerning democratic governance, the main findings of the study include:

No over-concentration of powers in the executive: International law prohibits—in general terms—the over-concentration of power in the executive. Unaccountable decision-making, legislative powers of unelected institutions, or unfettered executive powers of unelected bodies are cases of inadmissible over-concentration of powers in the hands of the executive. Powers of government bodies to issue laws, decrees, and decisions without being subject to independent review are also generally incompatible with international law.

Minimum rights of Parliament: Under international law, parliaments have the right to supervise the executive and to legislate without external interference. Case law also supports the right of Parliament to adopt national budgets and to organise themselves autonomously. Other parliamentary rights such as the right to discuss politics are implicit in international law only to some extent. In addition, issues such as the delegation of legislative powers to the executive, representative composition of legislatures, or immunities of parliamentarians are only partly covered by international law, if at all.

Constitution making processes: The ICCPR requires State parties to afford citizens an effective opportunity to participate in constitution-making processes. According to the HRC, these reform processes should be transparent and inclusive. Although common practice in many States, international law does not require the adoption of a constitution by a qualified majority. There is also no obligation for States to put a constitution to referendum or to ensure other specific forms of participation.

Civilian control of the armed forces: The ICCPR requires State parties to ensure full and effective civilian supervision and to define the competencies of the armed forces in law. It also calls for a degree of transparency. However, international law could play a stronger role in building accountable armed forces by restricting the military's mandate—in principle—to defence, or by requiring that defence budgets be subject to parliamentary oversight.

Transparency: The ICCPR, as interpreted by the HRC, regulates access to information in some detail. The ICCPR transparency regime, however, would benefit from additional guidance on access to government proceedings and grounds for denying access to information.

Political parties: The ICCPR provides relatively detailed protection against state interference in the activities of political parties. Restrictions on the registration, operation, or prohibition of a political party must be narrowly constructed and proportionate. However, international law would benefit from more explicit guidance on key issues such as circumstances in which the banning of political parties is permissible or requirements on internal-party democracy.

Civil society organisations: The ICCPR contains broad requirements for the registration and free operation of NGOs. This framework, however, would benefit from more detailed guidance on issues such as unhindered operation, fair registration

processes, taxing and funding of NGOs, and cooperation with foreign partners and donors.

Right to democracy: International law determines minimum standards on key aspects of democratic governance but it does not establish a stand-alone “right to democracy” *per se*. This is largely because the term and concept of democracy is too broad and too vague to be regulated by a single legal norm. In other words, a right of democracy does not exist because its scope and content overstretches the regulatory abilities of law, which cannot regulate what is inherently vague. Elements defining democracy are, however, largely guaranteed by international law.

A new or revised General Comment on article 25 is recommended: Although international law establishes a number of minimum requirements for democratic governance, it is sometimes vague and ambiguous. While treaty amendments would provide for the highest possible degree of legal certainty, they are not required to close gaps. Given the political difficulties in amending international human rights treaties, this is good news. Instead, many of the shortcomings that exist can be addressed through interpretation and reference to HRC decisions. In other instances, gaps could be addressed through revised or new General Comments. In particular, an amended General Comment on article 25 of the ICCPR could address existing gaps and ambiguities. Annex 1 contains a detailed list of recommendations.

DEMOCRATIC ELECTIONS

Concerning democratic elections, the study makes the following conclusions:

International law provides fairly detailed guidance on electoral processes: The right to participate in genuine elections is generally well established in international law. The ICCPR and regional instruments as the source of many of these obligations provide a good deal of practical detail.

Genuine elections are protected in international law: Article 25 of the ICCPR not only lies at the heart of democratic governance, but also forms the basis of an international legal understanding of genuine elections. However, genuine elections require more than just the fulfilment of the rights guaranteed by article 25. Elections should be competitive, with voters offered a real choice, the votes should be counted honestly and accurately, and a number of other rights, including freedoms of association, assembly, expression, and movement; access to information; and security of the person must also be guaranteed. A new or revised General Comment on article 25 could provide a clear definition of the term ‘genuine elections’ that includes these essential elements.

International law implicitly recognizes the electoral cycle: International law (principally in the interpretation of the HRC) implicitly recognizes 12 essential elements of the electoral process. These include: (1) Legal Framework for Elections; (2) Electoral Systems; (3) Boundary Delimitation; (4) Election Management; (5) Voter Registration; (6) Voter Education; (7) Candidacy and Campaigning; (8) Voting Processes; (9) Counting and Tabulation; (10) Dispute Resolution; (11) The Media; and (12) Election Observation.

The right to vote and be elected: The rights to vote and to be

elected are clearly established in international law. However, these rights are subject to reasonable restrictions, many of which are outlined in international law. International law does not adequately address the impact of election procedure on the enjoyment of these rights, particularly in the voting and counting processes but also throughout the broader election cycle. Future interpretative documents, such as a General Comment, could provide greater clarity on issues such as the permissible deviation from absolute equality of the population when drawing electoral boundaries.

Electoral System: International law recognizes the need for an electoral system, but does not advocate or proscribe a particular system. Rather, all electoral systems are permissible as long as they uphold fundamental rights and freedoms and international obligations. However, different electoral systems have different implications on article 25 rights; this is not currently addressed in international law.

The Legal Framework for Elections: International law recognizes that elections require that an effective legal framework, which protects fundamental rights and freedoms, be in place. However, international law does not consistently address two key issues with regard to the legal framework: first, the need for a stable legal framework, established in advance of election day; and second, the extraordinary challenges created by the tension between the full enjoyment of fundamental rights and freedoms and the time constraints inherent in the electoral process.

Campaign Finance: International law is largely silent on campaign finance issues, despite some progress made at the regional level within the Council of Europe. Additional interpretation of the ICCPR and the UNCAC with regard to campaign finance would be beneficial, including providing clarity on the degree to which the obligations in those treaties require States to regulate issues such as: the disclosure of campaign and party finances, spending and contribution limits, and restrictions on foreign donations.

Election Management Bodies: International law partially addresses the need for an independent and impartial body to administer elections and the roles and responsibilities of that body. Additional clarity on the relationship between an election management body (EMB) and other branches of government and the means by which States can ensure that the EMB is effective in their work and transparent in their functioning would be beneficial.

Observation of elections: Although observation of elections, both domestic and international, is an increasingly common practice around the world, international law is largely silent on the rights of observers. This is particularly striking with regard to domestic observers who, as citizens, have a right to participate in the public affairs of their country. International law goes some way to protect the rights of civil society and NGOs quite broadly. However, international law largely fails to address the value and special needs of domestic observation groups, specifically their right of access to information regarding all aspects of the electoral process.

A new or revised General Comment on article 25 is recommended: While international law clearly establishes electoral rights and obligations on the State, there remain ambiguities and gaps particularly regarding implementation. A fairly wide margin of

appreciation is left to the State with regard to the implementation of electoral processes. This is, in many cases, appropriate; however, it has led to a variety of practices and inconsistencies among States. Steps can be taken to provide greater clarity on how to most effectively guarantee these rights without impinging on the political sovereignty of States. Many of the ambiguities and gaps could be addressed through a new or revised General Comment on article 25. Annex 1 contains a detailed list of recommendations.

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² <http://www.democracy-reporting.org/programmes/democracy-standards.html>.

³ <http://www.cartercenter.org/peace/democracy/des.html>.

TERMS AND ABBREVIATIONS

ACDEG

African Charter on Democracy, Elections and Governance

ACHPR

African Charter on Human and Peoples' Rights

ACHR

American Convention on Human Rights

ASEAN

Association of Southeast Asian Nations

AU

African Union

CAT

Committee Against Torture

CEDAW

Convention on the Elimination of Discrimination Against Women

CERD

International Convention on the Elimination of All Forms of Racial Discrimination

CoE

Council of Europe

CSO

Civil Society Organisation

DRI

Democracy Reporting International

ECHR

European Convention on Human Rights and Fundamental Freedoms

ECtHR

European Court of Human Rights

ECOWAS

Economic Community of West African States

EMB

Election Management Body

HRC

United Nations Human Rights Committee

ICCPR

International Covenant on Civil and Political Rights

ICERD

International Covenant on the Elimination of Racial Discrimination

ICJ

International Court of Justice

IDP

Internally Displaced Person

Inter-AmCHR

Inter-American Commission on Human Rights

Inter-AmCtHR

Inter-American Court of Human Rights

IPU

Inter-Parliamentary Union

NGO

Non-governmental Organization

OAS

Organization of American States

OSCE

Organization for Security and Cooperation in Europe

SADC PF

Southern African Development Community Parliamentary Forum

UN

United Nations

UNCAC

United Nations Convention Against Torture

UNECE

United Nations Economic Commission for Europe

UNSG

United Nations Secretary General

VCLT

Vienna Convention on the Law of Treaties

1. INTRODUCTION

International law contains numerous rules relevant for democratic governance and genuine elections. With 167 State parties from all regions of the world, the International Covenant on Civil and Political Rights (ICCPR) is particularly relevant, granting individuals the right to vote and to take part in public affairs, and guaranteeing freedoms of association, assembly, and expression. Other human rights treaties contain similar or nearly identical provisions. As such, these treaties constitute nearly global consensus on minimum requirements for democratic governance and genuine elections.

Despite its virtually universal scope and high authority, international law has shaped national debates and international discussions on democratic governance and elections only to a limited extent. Constitution makers and election observers refer to international law rarely. Although the situation has improved since the end of the Cold War, international organisations have often been silent on the relationship between international law on the one hand and elections and democratic governance on the other. Even today, institutions called to monitor the implementation of international obligations pay little attention to political rights.⁴ The EU, for example, remained silent on the role of international law as a benchmark for democratic governance and elections in its 2009 Council Conclusions on Democracy Support, the EU's key document on democratisation.⁵ International election observers have often failed to ground their assessments in international law.⁶

This is a problem for many reasons, not only because international law is legally binding and non-compliance is therefore a breach of a legal obligation, but also because ignoring international law deprives constitution makers and national election administrators of a key benchmark and source of inspiration. In addition, systematic reference to international law can lessen contention within debates on electoral practices and democratic governance by providing a neutral and mutually accepted framework. This can help mitigate conflicts that erupt when the credibility of an electoral or constitutional process is questioned. Reference to international law and other agreed commitments can also help to ground politically charged debates in a mutually agreed upon and objective set of norms.

Ignoring international law is also problematic for the international community. Disregarding international law divests diplomats of a powerful tool to address accusations that elections or democracy are Western concepts relevant for developed countries but not suitable to many developing countries. In addition, international law is a forceful reference for evaluating the quality of an electoral

process and democratic governance because it relies on legal obligations that States have voluntarily accepted. As a mutually accepted framework, international law contains obligations that in principle cannot be simply cast aside as a concept imposed by Western countries.⁷

Despite its value, there are also challenges to the systematic use of international law:

- **Ambiguities and gaps:** While international law provides a wide range of relevant obligations for the holding of elections and democratic governance, ambiguities and gaps exist. International law is often general in nature and does not cover all relevant aspects of democratic elections and democratic governance. For these reasons, disagreement can arise as States interpret the norms in practice.
- **National margin of appreciation:** States have, and must have, wide discretion to establish institutions in accordance with national and local conditions and requirements. For this reason, international law has been considered neutral towards elections and democratic governance. Until the end of the Cold War it was conventional wisdom that States enjoy virtually unlimited discretion in holding elections or in designing institutional and constitutional settings.⁸

Against this background the study's objectives are threefold:

- First, the study aims to promote a wider use of international law in an effort to strengthen democratic governance and genuine elections. For this purpose, it intends to deepen the understanding of existing obligations and commitments relevant for democratic governance and genuine elections. The study also aims to catalyze political debate about the value and content of international law in relation to democracy.
- Second, it intends to identify gaps and ambiguities in international law, i.e. issues in need of further elaboration. In this context, it will provide recommendations on how to best address gaps, ambiguities, and inconsistencies.
- Third, the study, which is primarily addressed to governments, international organisations, NGOs, and other practitioners who work in the field of democratisation or elections, aims to serve as a practical reference point regarding the content of international law in the field of democratic governance and elections.

Section two explains the methodology. In section three, the study discusses the extent to which international law obligates States to organize themselves as a democracy. This section explores in some detail to what extent States are obligated to adhere to

⁴ Research by DRI, for example, estimates that the UN Human Rights Committee (HRC) has addressed article 25 issues in only 2% of its concluding remarks on country reports.

⁵ Council of European Union, Council Conclusions on Democracy Support in the EU's External Relations – Towards Increased Coherence and Effectiveness, 16081/09, Brussels (18 November 2009).

⁶ See *Using International Law*, by Davis-Roberts and Carroll arguing in favor of the strength of international law as the basis for election assessment criteria.

⁷ Davis-Roberts and Carroll, "Using International Law."

⁸ In 1986, in its famous *Nicaragua* decision, the International Court of Justice still seemed to affirm the "blindness" of international law towards the domestic structure of state power, i.e., the form of government in a given state, stating: "However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law." (ICJ, *Nicaragua vs. United States* 27 June 1986). See: Crawford, "Democracy and International Law," 113, 121; also Pippan, "International Law and Domestic Political Orders," 23.

principles such as separation of powers, transparency, rule of law, or accountability. In the fourth section, the study analyses the extent to which States are obliged to hold “genuine” elections, and what exactly international law considers a genuine election to be. Annex 1 contains a matrix that provides an overview of the study’s findings. Within its given scope, the study will be limited to providing a detailed overview of specific issues.

2. METHODOLOGY

Pursuing the above objectives, the study takes a three step-approach: first, it establishes the status quo of existing obligations and commitments; second, it identifies gaps and ambiguities; and third, it draws conclusions and—where necessary—makes recommendations on how to improve existing obligations and commitments.

2.1. STEP 1: ESTABLISHING THE STATUS QUO

As a first step, the study establishes the status quo by identifying existing obligations and—to a lesser extent—commitments relevant to democratic governance and genuine elections. Obligations are defined as legally binding rules which stem from international treaties, international customary law, general principles of law, or binding resolutions of international organisations. States are obliged to implement these obligations and incur state responsibility in case of breach. In contrast, political commitments are pledges that are not legally binding for States but constitute a political declaration. Such political commitments stem, for example, from non-binding resolutions of international organizations or political statements adopted at international conferences.

Given the study’s scope and universality, it will focus initially on United Nations (UN) related obligations and commitments. Supplementing this analysis of the UN framework, the study also evaluates regional obligations that originate from the Organization of American States (OAS) and the African Union (AU) where they complement or diverge from UN obligations.

Establishing the status quo requires an interpretation of relevant obligations and commitments. In doing this, the study will take a conservative approach in interpreting existing rules, guided by articles 31–33 of the Vienna Convention on the Law of Treaties (VCLT 1969), which are generally considered to be international customary law.⁹ According to article 31 (1) “a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 31 (3) stipulates that subsequent state practice in the application of a treaty shall be taken into account when interpreting a treaty provision.

At the same time, specific rules of interpretation apply to human right treaties, the key subject area of the study. Accordingly, restrictions derived from human rights obligations must be interpreted narrowly. Specifically, they “must be appropriate to achieve their protective function; must be the least intrusive instrument amongst those which might achieve their protective function; and must be proportionate to the interest to be protected.”¹⁰ As another specific rule of interpretation, human

⁹ Villiger, *Commentary on the Vienna Convention*, 439. See also: ICJ, *Serbia and Montenegro v. Belgium*, 318, para. 100: “customary international law, reflected in article 31;” ICJ, *La Grand (Germany v. US)*, 501, para. 99 (“customary international law...reflected in article 31”).

¹⁰ HRC, General Comment 34, para. 43.

rights are interpreted dynamically in light of relevant societal developments.¹¹

While not mentioned explicitly in article 31 of the VCLT, the *effet utile* interpretation—the principle of effectiveness—is an additional and generally accepted means of interpretation.¹² The International Court of Justice has referred extensively to the principle of effectiveness,¹³ as have human rights monitoring organs.¹⁴ Hence, obligations, which are implicit in the ICCPR and necessary to make the right to political participation effective, may be considered covered by the provision, even though they are not stated explicitly.

The United Nations Human Right Committee (HRC) and Interpretation of the ICCPR

The HRC is the main body tasked with interpreting and monitoring compliance with the ICCPR. As such, it is the pre-eminent interpreter of the ICCPR. The HRC is composed of independent and renowned experts from all regions of the world. The regionally diverse and independent composition of the body increases its authority. In view of its composition, the HRC cannot be accused of “Western” bias.

In addition to issuing views on individual cases, the HRC also issues General Comments that provide interpretation of particular articles of the ICCPR. Neither General Comments nor views on individual cases are legally binding *per se*; however, decisions of the HRC carry the highest authority in interpreting ICCPR provisions.

When establishing the status quo, the study will refer extensively to General Comments adopted by the HRC. According to article 40 (4) of the ICCPR, the HRC can adopt General Comments on the content and scope of specific ICCPR provisions. Although they are not part of international customary law and are not legally binding *per se*, General Comments reflect the HRC’s interpretation of a treaty norm. Because of the HRC’s mandated role as interpreter and monitoring body of the ICCPR, and as reflected in the leading ICCPR commentary by Manfred Novak, its interpretation is “authoritative” and gives rise to normative consensus on the meaning and scope of particular human rights.¹⁵ In addition, General Comments have become more detailed and elaborated over the past decades and are an important resource for

jurisprudence.¹⁶ As such, General Comments have been the basis or source for numerous HRC decisions, concluding observations or views on individual complaints by the HRC under the First Optional Protocol.

In addition to General Comments, the study will also draw from HRC decisions or “views” on the merits of individual cases brought under the First Optional Protocol. Like General Comments, these decisions are not legally binding *per se*; however, they contain the HRC’s interpretation of a treaty norm. Decisions of the HRC are therefore a strong indicator of a legal obligation under the ICCPR.¹⁷ In addition, the HRC has regularly followed its own decisions, creating a precedent in many cases. Further, HRC decisions under the optional protocol generally deliver more specific interpretation of the ICCPR because the Committee “rules” on a specific case. It is widely recognized that the HRC has taken a conservative approach to interpreting ICCPR norms; only occasionally have HRC decisions been perceived as *ultra vires*. For these reasons, the study accepts and applies General Comments and HRC views as the main and most forceful source of ICCPR interpretation and development, and as sources of emerging international law.

2.2. STEP 2: IDENTIFYING STRENGTHS, GAPS, AND AMBIGUITIES

As a second step, the study identifies strengths, gaps, and ambiguities in existing obligations and commitments. For an objective and neutral analysis, the study applies criteria that derive from legal principles, political declarations, or fundamental principles of democratic governance and genuine elections. Criteria are not based on political preferences or beliefs. Against this background, the study defines the term “gap” cautiously and considers a gap to be only those omissions and ambiguities that are enshrined in legal principles but have not, so far, been spelled out in detail. In line with resolution 41/120 (1986) of the HRC, omissions and ambiguities in international law mean that norms are not “sufficiently precise to give rise to identifiable and practicable rights and obligations.”

In more detail, the study’s gap analysis applies the following criteria, which are either part of international treaties, resolutions of international organizations (in particular General Assembly resolution 59/201¹⁸), or most national legal orders:

- **Transparency:** General Assembly resolution 59/201 states that transparency in public administration is an essential element of democracy. There is no standard definition of the term transparency but there is generally consensus that it refers to unfettered access by the public to timely and reliable information on decisions and performance in the public sector.

¹¹ Nowak, *CCPR Commentary*, XXVII; See also: HRC, *George Osbourne v. Jamaica*, para. 9.1; HRC, *Kennedy v. Trinidad and Tobago*, para. 6.3.

¹² See Sorel & Boré Eveno, article 31, in Corten and Klein, *Vienna Convention*, A Commentary, 804, 831.

¹³ See for example ICJ Advisory Opinion concerning Namibia, where the Court broadly interpreted the UN Charter provisions so that the General Assembly was able to exercise certain powers, ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, para. 104; As regards implicit powers of international organisations see for example ICJ, *Advisory Opinion on the Legality of Use of Nuclear Weapons*, para. 25.

¹⁴ See among numerous judgments, ECtHR, *Loizidou v. Turkey*, para. 72; ECtHR, *Conka v. Belgium*, para. 46; ECtHR, *Biozokat A.E. v. Greece*, para. 31.

¹⁵ Nowak, *CCPR Commentary*; Blake, “Normative instruments in international human rights law,” 38.

¹⁶ Joseph, Schultz & Castan, *The International Covenant on Civil and Political Rights*, 21.

¹⁷ *Ibid.* 24.

¹⁸ UN General Assembly, Resolution on “Enhancing the role of regional, sub-regional and other organisations” (2005).

3. DEMOCRATIC GOVERNANCE

International law does not obligate States to design their political system in a specific way. The ICCPR and other human rights treaties do not call for a specific model of democratic governance. It is therefore up to States to choose, for example, between a parliamentary or presidential democracy. However, international human rights treaties do guarantee most, if not all, key features of a democracy in at least general terms as outlined below:

- The ICCPR provides, in article 25, that every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives. Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), article 7 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), article 23 of the American Convention on Human Rights (ACHR) and article 13 of the African Charter on Human and Peoples' Rights (ACHPR) contain similar provisions.
- The Universal Declaration of Human Rights of 1948 (UDHR), which is generally considered to reflect customary international law, provides, in article 21, that “the will of the people shall be the basis of the authority of government.”¹⁹
- The ICCPR and other international human rights treaties protect other core elements of a democracy, such as freedoms of association, assembly, and expression, or the independence of the judiciary. The African Charter on Democracy, Elections and Governance (ACDEG) includes principles, such as respect for human rights and democratic principles; regular, transparent, free, and fair elections; separation of powers or effective participation of citizens in democratic and development processes and in governance of public affairs; and political pluralism.²⁰

In addition to these provisions, numerous political declarations of international organisations promote and protect elements of democratic governance. UN General Assembly resolution 59/201 (2005),²¹ for example, defines elements of a democracy as:

- Respect for human rights and fundamental freedoms, inter alia, freedom of association and peaceful assembly, freedom of expression, and freedom of opinion.
- The right to take part in the conduct of public affairs, directly or through freely chosen representatives, and to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people.

¹⁹ Universal Declaration of Human Rights.

²⁰ “Adopted in Addis Ababa, Ethiopia, on 30 January 2007 this Charter [The African Union Charter on Democracy, Elections and Governance] shall enter into force thirty (30) days after the deposit of fifteen (15) instruments of ratification. Signed by 38 countries from 53 member states and ratified only by 8.”

²¹ UN General Assembly, “Enhancing the role of regional, sub-regional and other organisations,” (2005).

- **Accountability:** According to General Assembly resolution 59/201 (2005), accountability in public administration is another essential element of democracy. Accountability requires that the public, through the media, elections, parliaments, courts, or other independent institutions, is able to hold those in power responsible for their actions. Accountability entails a high degree of transparency.
- **Genuine participation in public affairs and inclusiveness:** According to General Assembly resolution 59/201 (2005), the right to take part in the conduct of public affairs is another essential element of democracy. To be meaningful, participation needs to be genuine, i.e. it should not be a mere formal act but should enable influence in the decision-making process.
- **Principle of effet utile:** International courts refer routinely to the principle of effet utile. Under this principle, courts apply the interpretation that is most effective in facilitating the implementation of a treaty obligation or other commitments. The interpretation that ensures full implementation of a commitment or obligation prevails.
- **Principle of proportionality:** As developed by international jurisprudence, the principle of proportionality applies. In very general terms, restrictions of rights must be necessary to achieve a legitimate objective and must reflect the least restrictive measure.

2.3. STEP 3: CONCLUSION AND RECOMMENDATIONS

As a third step, and on the basis of previous analysis, the study draws conclusions and produces recommendations, which are offered at the end of each sub-section. In most cases, the study concludes that existing obligations and commitments are adequate and are not in need of improvement. In such cases the study might recommend raising awareness of the status quo and highlight particularly useful interpretations of international law.

Where the study concludes that obligations and commitments are deficient, either because they are incomplete or ambiguous, it offers recommendations for improvement. Given the political difficulties in amending international treaties, the study tries to address gaps first through interpretation and/or interpretive documents. If gaps cannot be addressed through interpretation, the study presents proposals for concrete measures, such as the development of new General Comments.

- A pluralistic system of political parties and organisations.
- Respect for the rule of law.
- The separation of powers and the independence of the judiciary.
- Transparency and accountability in public administration.
- Free, independent, and pluralistic media.²²

With 172 States in favour, 15 abstentions, and no rejections,²³ resolution 59/201 marks a nearly global consensus on key elements of a democracy. The UN Security Council has also adopted a number of resolutions in support of democracy. In the cases of Haiti, Sierra Leone, and Honduras, for example, the Security Council adopted Chapter VII measures to re-establish an elected government that had been ousted by a coup d'etat. Although other factors played an important role in these cases, the re-establishment of democracy was essential to address a threat to international peace.

In addition to the UN, the OAS, the Commonwealth, the Arab League, the Association of Southeast Asian States (ASEAN), and the Economic Community of West African States (ECOWAS) have adopted similar commitments to respect elements of democratic governance.

While there is nearly global consensus on the above key elements of democracy, there seems to be little common understanding of what they mean in practice and detail. Moreover, the key elements of democracy are themselves broad and vague concepts that require further specification. While it is relatively easy to subscribe to the broad term “democracy,” it is more difficult to reach a common understanding on details and practices. This chapter explores the extent to which international law defines and specifies the key elements of democracy, e.g. separation of powers, rights of Parliament, transparency, accountability, or rule of law.

3.1. SEPARATION OF POWERS

The principle of “separation of powers” should be understood as a standard requiring that each branch of government (or power) has the capacity to play a meaningful and sufficiently independent role, whatever the political system is in place.²⁴ The competencies of the three branches of governmental power should be clearly delimited and defined in law.

The term “separation of powers” is not explicitly used in international human rights instruments. Nevertheless, the HRC has referred to the principle on various occasions, noting, for example, in its concluding observations on Slovakia that “the lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy.”²⁵ In addition, the HRC has repeatedly recommended that States adopt legislation and measures to ensure that there is a clear distinction between the executive and judicial branches of government.²⁶ Further, the HRC has commended States including Croatia,²⁷ Nepal,²⁸ and Iceland,²⁹ for the “total separation of judicial and executive power.”

In **conclusion**, the principle of separation of powers is recognized by international law in general terms. The practical implications of this principle on more detailed issues, such as the overconcentration of powers in the executive, minimum rights of Parliament, or independence of the judiciary, are discussed in the next three sub-sections.

3.1.1. Over-concentration of Powers in the Executive

Article 25 of the ICCPR protects the right of every citizen to vote and to be elected. To render this right effective, elected bodies, such as parliaments or governments, must play a significant role in the political life of a country. In its General Comment on article 25 of the ICCPR, the HRC noted: “Where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power and that they are accountable through the electoral process for the exercise of that power.”³⁰

Applying these general requirements, the HRC has expressed concerns about the over-concentration of powers in the executive, one of the most significant problems in many struggling democracies or dictatorships. For example, in the case of Iraq, the HRC noted with deep concern that

all government power in Iraq is concentrated in the hands of an executive which is not subject to scrutiny or accountability, either politically or otherwise. It operates without any safeguards or checks and balances designed to ensure the proper protection of human rights and fundamental freedoms in accordance with the Covenant. This appears to be the most significant factor underlying many violations of Covenant rights in Iraq, both in law and in practice.³¹

22 Other UN General Assembly resolutions contain similar or identical language: UN General Assembly, “Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies,” (2000); UN General Assembly, “Promoting and consolidating democracy,” (2000); UN General Assembly, “2005 World Summit Outcome,” (2005); UN General Assembly, “Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies,” (2009).

23 The following states abstained: Belarus, Bhutan, China, Cuba, Democratic People’s Republic of Korea, Laos, Libya, Myanmar, Saudi Arabia, Syria, Turkmenistan, United Arab Emirates, Venezuela, Viet Nam, and Zimbabwe.

24 Meyer-Resende, *Democracy Revisited*.

25 HRC, Concluding Observations, Slovakia (1997), para. 3.

26 HRC, Concluding Observations of the Human Rights Committee, Romania (1999), para. 1; See also HRC, Concluding Observations, Peru (2000), para. 10; HRC, Concluding Observations, El Salvador (1994), para. 15; HRC, Concluding Observations, Tunisia (1994), para. 14; and, HRC, Concluding Observations, Nepal, para. 18.

27 HRC, Concluding Observations, Croatia (2001), para. 3.

28 HRC, Concluding Observations, Nepal (1994), para. 5.

29 HRC, Concluding Observations, Iceland (1993), para. 4.

30 HRC, General Comment 25, para. 7.

31 HRC, Concluding Observations, Iraq (1997), para.7.

More specifically, the HRC expressed concerns that under article 38 (c) of the Iraqi Constitution, members of the Revolutionary Command Council are not elected by universal and equal suffrage which is incompatible with the right of citizens to take part in the conduct of public affairs under article 25 (a) and (b) of the ICCPR. The HRC was also concerned that article 42 of the Constitution gives power to the Revolutionary Command Council to issue laws, decrees, and decisions without being subject to independent scrutiny or review to ensure their compliance with the provisions of the Covenant. This is incompatible with article 2, paragraph 3, which covers the right to effective remedy.³²

In the case of Chile, the HRC was deeply concerned by the enclaves of power retained by members of the former military regime. It held, among other issues, that the powers exercised by the (unelected) National Security Council are incompatible with article 25 of the ICCPR. Under Chile's 1980 constitution, the President cannot remove the serving heads of the armed forces without the consent of the National Security Council, which—given its composition—makes a dismissal unlikely. Article 96 of the constitution entitled the National Security Council to comment on any “event, act, or subject matter, which in its judgment gravely challenges the bases of the institutional order or could threaten national security.”

Similarly the HRC expressed concerns about excessive executive rights in Belarus when it criticized legislative powers in the hands of the executive without judicial control.³³ The HRC grounded its views, among others, in the President's competency to issue decrees penalizing new crimes, some of them even punishable by the death sentence. The HRC also based its views on the fact that police action is not regularly subject to independent review and that public prosecutors have the right to prolong pre-trial detention for up to 18 months without a judge's consent.

In the case of Morocco, the HRC raised similar concerns, deploring the “wide scope of executive power in the hands of the King [which] has implications for the effective independence of the judiciary and the democratic processes of Parliament.”³⁴ The HRC did not specify which of the King's powers were grounds for concern. However, under the Moroccan constitution of 1992, the King, who is “inviolable and sacred,” appoints and dismisses the government and dissolves Parliament with unlimited discretion. He also presides over the Council of Ministers, declares a state of emergency, and can issue laws by decree, unless 2/3 of Parliament rejects the decree. Members of Parliament enjoy no immunity if they express opinions questioning the monarchical system or lack respect due the King.

In **conclusion**, the ICCPR establishes a general principle prohibiting the over-concentration of powers in the executive. This has been developed in some detail by the HRC. According to relevant concluding observations of the HRC, unaccountable decision-making, legislative powers of unelected institutions, or unfettered executive powers of unelected bodies are cases of inadmissible over-concentration of powers in the hands of the

executive. Powers of government bodies to issue laws, decrees, and decisions without being subject to independent review are also generally incompatible with the ICCPR. Further, international law protects a number of rights of parliaments, thereby limiting executive powers (see next sub-section). However, the prohibition of over-concentration of powers in the hands of the executive provides only limited guidance in certain grey areas; greater clarity would be beneficial.

3.1.2. Minimum Rights of Parliaments

Parliaments with legislative rights and the capability to influence the politics of a country are an essential element of democracy. A minimum core of parliamentary rights deriving from article 25 of the ICCPR would include:

- Meaningful parliaments are a necessary precondition to render the citizens' right of political participation effective; and,
- The right to vote and participate in public affairs would become meaningless if the elected institutions do not, de jure or de facto, enjoy substantial rights and powers.

The HRC's interpretation of article 25 of the ICCPR confirms this view and implicitly grants to parliaments an essential role in the political life of countries. General Comment 25 states that, “where citizens participate in the conduct of public affairs through freely chosen representatives, it is implicit in article 25 that those representatives do in fact exercise governmental power.”³⁵

To grant parliaments effective “governmental powers,” it is vital that they are vested with a number of minimum rights. Some of these are confirmed by HRC case law, others can be derived from interpretation of article 25 of the ICCPR and analysis of common constitutional settings of States. As a statement of high political relevance, the Inter-Parliamentary Union (IPU)—the international organization of the Parliaments of sovereign States,³⁶ the Commonwealth Parliamentary Assembly,³⁷ the Assemblée Parlementaire de la Francophonie,³⁸ and the Southern African Development Community Parliamentary Forum (SADC PF) have elaborated on these minimum rights on various occasions. Among these minimum rights are:

- **Supervision of the executive:** The HRC has not specified what parliamentary oversight entails in detail but it has commended Croatia in general terms “for moving from an over-concentration of power in the executive branch to a more balanced form of parliamentary oversight of

32 HRC, Concluding Observations, Iraq (1997), para.18 and 19.

33 HRC, Concluding Observations, Belarus (1997), para. 7

34 HRC, Concluding Observations, Morocco (1994), para 16.

35 HRC, General Comment 25, para. 7.

36 Inter-Parliamentary Union “urges States to safeguard the role of parliaments and political institutions so as to enable parliamentarians to play their role properly and freely, inter alia by adopting legislation, overseeing the government and debating major societal issues,” see IPU Resolution of 16 September 1997.

37 Commonwealth Parliamentary Association, “Recommended benchmarks for Democratic Legislatures.”

38 Assemblée Parlementaire de la Francophonie, “La réalité démocratique des Parlements.”

the executive.”³⁹ Although not specified further in HRC decisions, indispensable components of parliamentary supervision include the ability to summon ministers, initiate hearings and investigations on government activities, request information, or discuss and criticise the government in public. If Parliament does not enjoy these specific rights, supervision of the executive would become meaningless, i.e. denying Parliament these privileges would in principle violate article 25 of the ICCPR. This interpretation of article 25 of the ICCPR is confirmed by state practice, which commonly grants parliaments with the right to supervise the executive. Regional parliamentary associations, which have called routinely for comprehensive oversight rights of Parliament, confirm this interpretation.⁴⁰

- **Legislative powers:** Legislative powers are at the core of parliamentary rights. Denying parliaments the right to adopt legislation would violate article 25 of the ICCPR. In the case of Chile, the HRC held that “powers accorded to the Senate to block initiatives adopted by the Congress [...] are incompatible with article 25.”⁴¹ According to the 1980 Constitution of Chile, the Senate consisted of elected and unelected Senators. Despite being partly unelected, the Senate was entitled to block legislation and decide on immunity of elected Members of Parliament.
- **Budget autonomy:** The full and unlimited right of Parliament to adopt the state budget is a necessary precondition to exercise effective supervision,⁴² and has historically been a key characteristic of independent parliaments. Accordingly it is incompatible with article 25 if Parliament cannot survey and adopt the state budget. In some countries, parliaments cannot adopt, for example, the defence budget, a practice that is not in line with article 25.
- **Procedural autonomy of parliaments:** Rules of procedure commonly determine key aspects of the functioning of parliaments. It would be incompatible with article 25 of the ICCPR if Parliament could not autonomously regulate key procedural aspects of its work, such as voting procedures, plenary debates, or committee work. This also suggests that parliaments in principle should be free to schedule sessions or to determine how much time a legislative process will take.
- **Two-chamber systems:** It is incompatible with article 25 of the ICCPR for an upper house that is based on hereditary principles or appointed by the President to have legislative powers. Chambers with legislative powers must be entirely composed of directly elected representatives. Otherwise, citizens’ right of political participation becomes ineffective.

In **conclusion**, international law regulates a number of issues essential for the functioning of parliaments. The HRC’s concluding

observations on Croatia confirm the right of Parliament to supervise the executive and to legislate without external interference. Practice and statements by inter-parliamentary organisations also support the right of Parliament to adopt national budgets and to organise themselves autonomously. Other parliamentary rights such as the right to discuss politics are implicit in international law to some extent.

While international law already contains a number of obligations relevant for the functioning of parliaments, the current framework would benefit from additional clarification on issues including:

- **Delegation of legislative powers:** Although the executive clearly has the right to adopt legally binding acts, either through decrees or regulation, Parliament may not delegate essential legislative powers to the executive. In this context, international law could offer general guidance on key areas that may only be legislated by Parliament.
- **Representative composition:** The IPU stresses that “Democracy (...) requires the existence of representative institutions at all levels and, in particular, a Parliament in which all components of society are represented and which has the requisite powers and means to express the will of the people by legislating and overseeing government action.”⁴³ However, it is uncertain whether international law requires a representative composition of Parliament that includes all components of society.
- **Immunities of parliamentarians:** Immunities protect members of Parliament against civil or criminal proceedings for acts undertaken outside the exercise of their parliamentary function. Despite significant differences in detail, the great majority of countries guarantee parliamentary immunities.⁴⁴ International law, however, remains silent on parliamentary immunities. Parliamentary immunities can only be derived from article 25 of the ICCPR to a limited extent: immunities of parliamentarians are arguably covered by international law when they are vital for ensuring the functioning of Parliament.

A revised General Comment 25 could address these issues since they appear to be implicit in article 25 of the ICCPR.

3.1.3 Relationship between the Judiciary and Executive

Under international law, the relationship between the judiciary and the executive is largely determined by article 14 of the ICCPR and similar provisions of regional human right treaties. Article 14 guarantees the right to a “fair and public trial by a competent, independent and impartial tribunal established by law.”⁴⁵ There

39 HRC, Concluding Observations, Croatia (2001), para. 3 (emphasis added).

40 IPU Resolution of 16 September 1997.

41 HRC, Concluding Observations, Chile (1999), para. 8.

42 See also Assoc. of Secretaries General of Parliaments, “The administrative and financial autonomy of parliamentary assemblies,” (1999).

43 The study tests post-communist countries in Europe and Central Asia. However, it does not test whether more significant democratization may be an effect of European Union enlargement. Furthermore, it does not test if the propensity for electoral fraud may impact on Parliaments’ performances.

44 Myttenaere, “The Immunities of Members of Parliament.”

45 “The wording and historical background of Art 14 thus demonstrate that agreement was reached in a universal human rights treaty on a provision based on liberal principles of the separation of powers and the independence of the judiciary vis-a-vis the executive.” Nowak, *CCPR Commentary*, 306 para 2.

are also a number of political commitments on the independence of the judiciary, such as Principle 1 of the UN Basic Principles on the Independence of the Judiciary.⁴⁶ In general terms the HRC has stated that “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent tribunal.”⁴⁷

In one of its most detailed General Comments, the HRC has specified the relationship between the executive and judiciary in further detail. According to General Comment 32, the independence of the judiciary requires State parties, among others, to:

- Adequately secure the status of judges, including their term of office, independence, security, adequate remuneration, conditions of service, pension, and age of retirement;
- Guarantee the security of tenure of judges until a mandatory retirement age or the expiry of their term of office, where such exist;
- Protect judges against conflicts of interest, intimidation, and political interference by the executive branch and legislature; and,
- Dismiss judges 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. More specifically, the dismissal of judges by the executive, e.g. before the expiry of the term, without any specific reasons given to them and without effective judicial protection is incompatible with the independence of the judiciary.

In addition, the HRC has specified a number of key issues regarding the independence of the judiciary, including:

- **Tenure:** the HRC has repeatedly stated that conditions for the appointment and dismissal of judges must guarantee the proper separation of the executive and the judiciary and the independence of the judiciary.⁴⁸ As such, it is incompatible with article 14 of the ICCPR to grant judges insecure tenure⁴⁹ or to dismiss judges without a legal basis.⁵⁰ The HRC has also recommended establishing an independent body to safeguard the independence of the judiciary and to supervise

46 Endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. See also International Commission of Jurists, *Legal Commentary to ICJ Berlin Declaration, Counter-terrorism, Human Rights and the Rule of Law*, Geneva 2008.

47 HRC, General Comment 32, para. 19.

48 HRC, Concluding Observations, Madagascar (2006-2007), para. 26; HRC, Concluding Observations of the Human Rights Committee, Equatorial Guinea (2004), para. 7; The Inter-American Court established in *Apitz Barbera y otros (“Corte Primera de lo Contencioso Administrativo”) v. Venezuela* that Venezuela had violated the right to a fair trial of the judges of the Venezuelan *Corte Primera de lo Contencioso Administrativo*, who had been destituted. The Inter-American Court ordered that Venezuela compensate the judges and re-institute them in their posts or in similar positions.

49 HRC, Concluding Observations, Uzbekistan (2009-2010), para 16; HRC, Concluding Observations, Republic of Moldova (2009-2010), para. 24.

50 HRC, Mr. Mikhail Ivanovich Pastukhov v. Belarus.

the appointment, promotion and professional conduct of judges (article 14).⁵¹

- **Interference in procedures:** it is incompatible with article 14 of the ICCPR for the Ministry of Justice or the Attorney General to have the power to end court procedures.⁵² In its case law the HRC has considered that the powers exercised by the Ministry of Justice in regard to judicial matters, including the appeal process and its powers of inspection of the courts, can constitute an interference by the executive and a threat to the independence of the judiciary.⁵³
- **Judicial decisions:** Judicial decisions cannot be changed by a non-judicial authority, except for cases of mitigation or commutation of sentences and pardons.⁵⁴ In one case the HRC considered trials conducted by a parliamentary body incompatible with article 14 of the ICCPR.⁵⁵ The HRC reiterated this view when it stated that, even in time of war or in a state of emergency, “[o]nly a court of law may try and convict a person for a criminal offence.”⁵⁶

In addition to the HRC and other UN treaty bodies,⁵⁷ the Inter-American Court of Human Rights,⁵⁸ the Inter-American Commission on Human Rights,⁵⁹ and the African Commission on Human and Peoples’ Rights⁶⁰ also refer to the above principles when examining the independence and impartiality of courts.⁶¹

In **conclusion**, international law, as developed by the HRC and other relevant bodies, provides detail on and adequate protection for the independence of the judiciary. International jurisprudence has not only repeatedly referred to the principle of the independence of the judiciary but also has developed a comprehensive and detailed body of cases on key issues of judicial independence. However, while the independence of the

51 HRC, Concluding Observations, Honduras (2006-2007), para. 16.

52 HRC, Concluding Observations, Cameroon (2009-2010), para. 23.

53 HRC, Concluding Observations, Romania, para. 10.

54 *UN Basic Principles on the Independence of the Judiciary: Principles 3 and 4.* Principle 3 states: “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.” Principle 4 says: “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”

55 HRC, Concluding Observations, Equatorial Guinea (2004), para. 7.

56 HRC, General Comment No. 29, para. 16; See also Inter-American Court of Human Rights, stating that basic judicial guarantees are non derogable in Inter-American Court of Human Rights, *Garantías Judiciales en Estados de Emergencia* (article s. 27.2, 25 y 8 Convención Americana sobre Derechos Humanos), Opinión Consultiva OC-9/87, Serie A No. 9, (6 October 1987), para. 35.

57 See for example, HRC, Concluding Observations, Belarus (1997), para. 14; CAT, Concluding Observations, Uzbekistan (1999), para. 81; CAT, Concluding Observations, Armenia (2000), para. 39; CAT, Concluding Observations, Kyrgyzstan (2000) para. 75; and, CAT, Conclusions and Recommendations, Azerbaijan (2003), para. 7.

58 See for example, Inter-AmCt.HR, *Castrillo Petruzzi et al v. Peru* (1999).

59 See the Inter-AmCHR, Second Report on the Situation of Human Rights in Peru (2 June 2000); Inter-AmCHR, *Guy Malary v. Haiti*, para. 74.

60 See the Decision dated 6 November 2000, Communication N° 223/98 (Sierra Leone) and Decision dated 15 November 1999, Communication N° 151/96 (Nigeria).

61 International Commission of Jurists, “Legal Commentary to ICJ Berlin Declaration.”

judiciary is a well-developed and comprehensive principle of international law, its implementation often remains poor.

3.2. CONSTITUTION MAKING PROCESSES

Article 25 of the ICCPR establishes a right of every citizen “to take part in the conduct of public affairs, directly or through freely chosen representatives.” This right is granted “without any of the distinctions mentioned in article 2 and without unreasonable restrictions.” Specifying this right, General Comment 25 states that State parties should adopt “such legislative and other measures as may be necessary to ensure that citizens have an effective opportunity to enjoy the rights it protects,” i.e. to take part in the conduct of public affairs. Under General Comment 25, the conduct of public affairs is considered to encompass constitution-making processes.⁶² In the case of *Marshall v. Canada*, the Committee explicitly concluded that constitutional conferences constituted “conduct of public affairs” in the sense of article 25 (a) ICCPR.⁶³

This does not necessarily mean that citizens have an unconditional right to choose the modalities of such participation. Instead, State parties have wide discretion in designing the process of constitutional reform. In the first place, State parties can choose between direct participation through referenda or other indirect forms of participation. Unlike the requirement to hold periodic elections, State parties are not obliged to conduct public consultations or referenda.⁶⁴ According to the HRC, article 25 (a) of the ICCPR does not mean that “any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs.”⁶⁵ Accordingly, it is for the legal and constitutional system of the respective State to determine whether citizens participate directly or indirectly through elected representatives.⁶⁶

At the same time, these modalities must not place restrictions on public participation that are either unreasonable or discriminatory.⁶⁷ In this sense, State parties must allow citizens to take part in referenda if conducted. More specifically, the HRC has called for constitutional reform processes that are transparent and include all stakeholders.⁶⁸ Accordingly, transparency and the wide participation of all stakeholders constitute important legal requirements for constitution making. Along similar lines, the UN Secretary General and commentators increasingly advocate for the expansion of direct participation in constitution-making in order to allow citizens to effectively influence the process.⁶⁹

In **conclusion**, article 25 of the ICCPR stipulates that citizens should have an effective opportunity to participate in constitution-making processes, which should be transparent and inclusive. Other requirements, such as broad based consensus on a constitution or specific consultation obligations, are not part of international law. Although common practice in many states, international law does not require the adoption of a constitution by a qualified majority. There is also no obligation for States to put a constitution to a referendum or to ensure other specific forms of participation.

3.3. INDEPENDENT INSTITUTIONS

Independent institutions play an important role in holding governments accountable by providing oversight of specific areas of executive action. Typical independent institutions include election commissions, national human rights institutions (e.g. national human rights commissions or ombudsman), anti-corruption bodies, and state auditing offices, as well as institutions such as central banks or courts of auditors.⁷⁰

International organisations stress the importance of such institutions. With regard to human rights institutions, participating states of the Organisation for Security and Cooperation in Europe (OSCE) have expressed their intention “to facilitate the establishment and strengthening of independent national institutions in the area of human rights and the rule of law.”⁷¹ The United Nations’ “Paris Principles” provide detailed guidance on the composition of such institutions and guarantees their independence.⁷² The IPU notes: “Judicial institutions and independent, impartial and effective oversight mechanisms are the guarantors for the rule of law on which democracy is founded.”⁷³

International law, however, is largely silent on the establishment and functioning of independent institutions. No provision exists requiring States to establish independent institutions, which appears, *prima facie*, to be an omission. However, if other state institutions provide for transparency and accountability—the key objectives of independent institutions—there is not necessarily a gap in practical or legal terms. There are strong arguments for granting States wide discretion on how to ensure transparency and accountability, as long as these principles are respected. Nonetheless, it is possible—at least in extreme cases—that the principles of transparency and accountability require states to establish such independent bodies, provided that this is the only way to ensure minimum levels of accountability and transparency.

62 HRC, General Comment 25, para. 6.

63 HRC, *Donald Marshall v. Canada*, para. 5.3.

64 Nowak, *ICCPR Commentary*, 572.

65 HRC, *Donald Marshall v. Canada*.

66 HRC, *Donald Marshall v. Canada*, paras. 5.4–5.5.

67 Democracy Reporting International, “Lessons Learned From Constitution Making,” 3.

68 HRC, *Concluding Observations, Bosnia and Herzegovina (2006-2007)*, para. 8.

69 UN Secretary-General (UNSG), “Guidance Note of the Secretary-General: United Nations Assistance to Constitution-making Processes,” (2009); Banks, “Expanding Participation in Constitution Making,” 1055.

70 Democracy Reporting International, “International Standards for Democratic Governance.”

71 CSCE, “Document of the Copenhagen Meeting,” point 27.

72 UN, *Paris Principles*, adopted by General Assembly resolution 48/134 (1993).

73 IPU, *Resolution of 15 September 1997*, point 17.

3.4. EMPOWERMENT OF THE EXECUTIVE DURING A STATE OF EMERGENCY

During a state of emergency democratic governance is diminished. The executive is temporarily empowered at the expense of the legislature (and possibly the judiciary) and human rights, including political rights, may be suspended or severely restricted. However, while international human rights instruments acknowledge the right of States to declare a state of emergency, this does not give States a free hand to adopt whatever measures they deem necessary. International and regional instruments, notably the ICCPR,⁷⁴ the European Convention on Human Rights and Fundamental Freedoms (ECHR),⁷⁵ and OSCE commitments provide a number of detailed procedural and substantive legal rules on the state of emergency.

According to article 4 of the ICCPR, State parties may declare a state of emergency (and thus derogate their ICCPR obligations) during extreme times that threaten the life of the nation and its existence. The declaration of a state of emergency allows State parties to derogate from ICCPR obligations but only to the extent strictly required by the exigencies of public emergency. Emergency measures may not be inconsistent with other obligations under international law and may not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin. Even during a state of emergency, State parties may not derogate from a number of ICCPR provisions, including the right to life; prohibition of torture; freedom of thought; prohibition of slavery; prohibition of imprisonment due to inability to fulfil a contractual obligation; the principle of legality in the field of criminal law; the recognition of everyone as a person before the law; or freedom of thought, conscience, and religion. Article 4 does not provide justification to breach the State's other international obligations, whether based on treaty or general international law. A State party availing itself of the right of derogation must immediately inform the other State parties.

In General Comment 29, the HRC provided detailed interpretation of article 4, including very specific procedural and substantive requirements for the declaration and effects of a state of emergency.⁷⁶ According to General Comment 29 a state may only invoke article 4 if:

- The situation amounts to a public emergency that threatens the life of the nation;
- The state of emergency has been officially proclaimed by a constitutionally competent body;
- Emergency measures are limited to the extent strictly required by the exigencies of the situation and meet proportionality tests; and,
- The state of emergency is of an exceptional and temporary

⁷⁴ Note General Comment 5, and The Siracusa Principles (1984), which had a considerable impact on the interpretation of article 4 of the ICCPR. See also M. Nowak, 2005, 83ff.

⁷⁵ ECHR, article 15.

⁷⁶ See also concretization in state reports, e.g. with respect to Chile...Report of the HRC, UN Doc A/34/40, 1979, 18ff.

nature and only lasts as long as the life of the nation concerned is threatened.

Giving concrete and illustrative examples of a natural catastrophe, a mass demonstration including instances of violence, or a major industrial accident, the HRC requests States to justify not only that such a situation constitutes a threat to the life of the nation, but also that all of their measures derogating from the Covenant are strictly required by the exigencies of the situation. Importantly, the HRC states that restrictions on certain ICCPR rights, such as freedom of movement or freedom of assembly, are often sufficient to address an emergency situation.

The HRC has elaborated upon these provisions further in a number of cases.⁷⁷ In the case *Landinelli Silva v Uruguay*, the HRC came to the noteworthy conclusion that the suspension of all political rights of opposition members was not within the meaning of article 4(1).⁷⁸

By specifying these restrictions on State parties proclaiming a state of emergency, the HRC has provided a very detailed and authoritative interpretation of article 4 of the ICCPR. However, international law provides only limited guidance on the following issues:

- **Dissolving Parliament:** The ICCPR regime contains no general prohibition on the dissolution of Parliament during a state of emergency, only providing a general obligation to limit the state of emergency to measures “strictly required by exigencies of situation.” In contrast, OSCE participating States commit to “ensure that the normal functioning of the legislative bodies will be guaranteed to the highest possible extent during a state of public emergency.”⁷⁹ Even this OSCE commitment seems debatable because it is inconceivable in what circumstance the dissolution of Parliament would be “strictly required by the exigencies of the situation.”
- **Accountability requirements:** Unlike OSCE commitments, the ICCPR does not explicitly stipulate any accountability requirements during times of emergency. It does, however, recognize the importance of democratic accountability in periods of emergency and stresses that a proclamation of a state of emergency “should be subject to approval in the shortest possible time or to control by the legislature.”⁸⁰
- **Geographic limits:** Given that declaring a state of emergency is an exceptional measure, OSCE participating States have committed to limit the state of emergency as much as possible, not only in time but also in terms of its territorial

⁷⁷ HRC, Concluding observations, Egypt (1993), para. 9; See also: HRC, Concluding observations, United Republic of Tanzania (1992), para. 7; HRC, Concluding observations, Dominican Republic (1993), para. 4; HRC, Concluding observations, United Kingdom of Great Britain and Northern Ireland (1995), para. 23; HRC, Concluding observations, Peru (1996), para. 11; HRC, Concluding observations, Bolivia (1997), para. 14; HRC, Concluding observations, Colombia (1997), para. 25; HRC, Concluding observations, Lebanon (1997), para. 10; HRC, Concluding observations, Uruguay (1998), para. 8; HRC, Concluding observations, Israel (1998), para. 11.

⁷⁸ HRC, *Jorge Landinelli Silva et al. v. Uruguay*, para. 8.4.

⁷⁹ *Ibid*, point 28.5.

⁸⁰ *Ibid*, point 28.2.

scope.⁸¹ While General Comment 29 recognizes time limitations, it contains no explicit geographic limits.

General Comment 29 focuses on individual rights and procedural requirements and only guarantees to some extent the rights of elected bodies during a state of emergency—fundamental issues of democracy. Consideration should therefore be given to clarifying rights of Parliament during a state of emergency in revised General Comment on article 4. The more specific OSCE commitments could help to inform the revision of the General Comment.

3.5. CIVILIAN CONTROL OF THE SECURITY SECTOR

Implicitly deriving from article 25 of the ICCPR, the security sector, as part of the executive, must be fully and effectively supervised and controlled by elected authorities. The principle of separation of powers requires a degree of supervision, as discussed above. To ensure full and effective civilian supervision, the mandate, composition, command, and number of the armed forces must be clearly defined by law.

HRC case law confirms the requirement of full and effective civilian control over the military. In the case of Haiti, the HRC noted “with particular concern the lack of full and effective control by civilian authorities over the military” and expressed concern that the “composition, command and number of the armed forces is not clearly defined.”⁸² In the case of Romania, the HRC was troubled by “the lack of a clear legal framework, defining and limiting the role of the security forces and providing for effective civilian control over them,” and stated that “[t]he State party should promptly provide for such limitations and control by legislation and appropriate regulations.”⁸³ Additionally, the UN Human Rights Commission resolution on “Democracy and the Rule of Law” states: “[t]he military remains accountable to democratically elected civilian Government.”⁸⁴

In light of these general requirements, article 25 of the ICCPR is understood to require State parties to hold the military accountable to elected and constitutionally responsible bodies, for example by introducing regular reporting and monitoring schemes. Article 25 of the ICCPR also requires that the mandate and competencies of the military are defined by law; vague and broad competencies would not be compatible with international law. State parties would violate article 25 of the ICCPR if Parliament were not allowed to adopt or even discuss the national defence budget.

In **conclusion**, international law regulates key features of civilian control of the armed forces. It requires State parties to ensure full and effective civilian supervision and to define the competencies of the armed forces in law. It also calls for a degree of transparency. These are valuable and surprisingly comprehensive benchmarks

that are rarely applied when discussing military interference or takeover of civilian and elected governments.

However, international law would play a stronger role in building accountable armed forces if the following issues were addressed in relevant international documents, such as General Comments:

- In order to ensure full and effective civilian control, the military should only have a mandate in defence. The military should not engage in civilian affairs, such as general education, taxes, or business operations.
- The military should refrain from interfering in government affairs through public criticism or threats.
- Defence budgets should be explicitly subject to parliamentary oversight.
- There should be minimum requirements on the kind of information about the armed forces that should be accessible to the public.

OSCE commitments could inform discussions on the civilian control of the armed forces under international law. OSCE States have committed themselves to democratically controlled, accountable, and transparent—subject to national security—armed forces:

Each participating State will at all times provide for and maintain effective guidance to and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy. Each participating state will provide controls to ensure that such authorities fulfil their constitutional and legal responsibilities. They will clearly define the roles and missions of such forces and their obligation to act solely within the constitutional framework. (...) Each participating state will, with due regard to national security requirements (...) provide for transparency and public access to information related to the armed forces. (...) The participating States will not tolerate or support forces that are not accountable to or controlled by their constitutionally established authorities.⁸⁵

3.6. TRANSPARENCY

The principle of transparency, i.e. the right of access to government proceedings and information as well as information disseminated by public authorities, is enshrined in several international treaties. For example, article 19 (2) of the ICCPR states that “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 (...)” Freedom of information is essential to other rights, such as the right to vote, as recognized in General Comment 34, which⁸⁶ states that “Freedom of expression is a necessary condition for the realization of the principles of transparency and

81 Ibid, point 28.3.

82 HRC, Concluding Observations, Haiti (1995) paras. 224-241.

83 HRC, Concluding Observations: Romania (1999) para. 9.

84 UN Commission on Human Rights, “Human Rights Resolution 2005/32: Democracy and the Rule of Law,” (2005), para. 14(b)(vii).

85 CSCE, “Concluding Document of Budapest,” (6 December 1994), points 21 –25.

86 HRC, General Comment 34, para. 4.

accountability that are, in turn, essential for the promotion and protection of human rights”.

According to General Comment 34, article 19 (2) embraces a right of access to information held by public bodies. The right of access to information also grants the media the right of access to information on public affairs and grants the general public the right to receive media output. In conjunction with article 17 of the ICCPR, article 19 of the ICCPR entitles individuals to learn about storage of personal data and to claim rectification of incorrect data or data processed in violation of the law. General Comment 34 also specifies further scenarios in which individuals can claim access to information, such as criminal procedures that concern them or decisions of a State party that substantively compromise the culture of a minority.

In addition freedom of expression—as developed by General Comment 34—requires state parties to proactively make available in the public domain government information of public interest and to adopt legislation that facilitates access to information. Significantly, General Comment 34 sets narrow and strict requirements for restricting freedom of expression, explicitly stating, for example, that State parties should not suppress public information of legitimate public interest that does not harm national security. According to General Comment 34, authorities should circumscribe access to information narrowly and should substantiate “any refusal to provide access to information.”

General Comment 34 makes numerous references to HRC case law, which is comprehensive and specifies additional requirements. In the case of *Bosnia and Herzegovina*,⁸⁷ for example, the HRC called on the State to “reopen talks on the constitutional reform in a transparent process and on a wide participatory basis, including all stakeholders, with a view to adopting an electoral system that guarantees equal enjoyment of the rights under article 25 of the Covenant to all citizens irrespective of ethnicity.” Applying articles 19 and 25, the HRC stressed, in the case of *Gauthier v Canada*, the importance of access to information about the democratic process and of the political right of citizens, in particular through the media, to be informed of the activities of elected bodies and their members.⁸⁸

In addition to the general requirements of the ICCPR, other international treaties establish transparency requirements for specific policy areas, such as combating corruption and environmental protection. For example, article 10 of the UN Convention against Corruption requires State parties “to take measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate.” Concerning campaign financing and the funding of political parties, article 7 (3) obliges State parties “to consider taking appropriate legislative and administrative measures to enhance

transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.”

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters establishes a comprehensive system to access to environmental information. The Convention grants—among other matters—individual rights for access to environmental information. Article 4 of the Convention requires State parties, within the framework of national legislation, to make environmental information available to the public. The Aarhus Convention stipulates explicitly grounds for refusal, such as confidential requirements, national security concerns, intellectual property rights, or manifestly unreasonable requests. The rules limiting access to information must be applied in a restrictive way.⁸⁹ According to article 5, State parties must collect and disseminate environmental information.⁹⁰

In **conclusion**, the international transparency regime of the ICCPR is comprehensive. With its new General Comment 34 and detailed case law, the HRC has elaborated considerably the requirements of article 19. Nevertheless, the ICCPR transparency framework would benefit from additional guidance on access to government proceedings, where international law is silent. The framework would also be improved if the grounds for denying access to information were specified in more detail. Unlike the treaties on specific subject areas, General Comment 34 does not specify the grounds for denying access to information, which weakens the transparency obligations of the ICCPR considerably. In contrast, the Aarhus Convention provides considerable detail on permissible restrictions on access to information under its provisions. However, the Aarhus Convention—although more comprehensive—cannot fill the gap itself, as its scope is restricted to regulating access to environmental information and as it applies only to members of the United Nations Economic Commission for Europe (UNECE). Yet, in further defining the grounds for refusal of access to information, the Aarhus Convention could inform the deliberations.

In comparison to the ICCPR and Aarhus Convention, the transparency rules of the Convention against Corruption are weak. Under this Convention, State parties are required to take specific measures only where appropriate or necessary. Rights to access of information are also subject to “principle of national laws.”

3.7. ACCOUNTABILITY

Article 21 of the UDHR stipulates that the will of the people is the basis of the authority of government. Similarly, article 25 of the ICCPR establishes that state authority is based on the sovereignty of the people, i.e. the government is ultimately responsible to the people and also may be controlled by and replaced through elections. As a means of effectively ensuring that the will of the people is the ultimate source of governmental powers, accountability therefore is implicitly contained in the ICCPR and

87 HRC, Concluding Observations, *Bosnia and Herzegovina* (2006-2007), para. 8, (emphasis added).

88 See HRC, *Robert W. Gauthier v. Canada*; also jurisprudence of the Inter-AmCt.HR, *Claude Reyes y otros vs. Chile*; *Gomes Lund y otros (Guerrilha do Araguaia) vs. Brasil*; see for further reference Burgorgue-Larsen and de Torres, *Las decisiones básicas de la Corte Interamericana de derechos Humanos*.

89 UNECE, Aarhus Convention, article 4 (4).

90 UNECE, Aarhus Convention, article 5.

UDHR. International law, in general, recognizes the principle of accountability in broad terms. Accordingly, absolute monarchical legitimacy, a Führerprinzip, or similar autocratic structures are incompatible with article 25 of the ICCPR.⁹¹

Accountability of those holding public offices, whether elected or non-elected, is an essential and indispensable element of democracy. Foremost, accountability entails that public officers can be held responsible for their actions, which include the right to demand their resignation. Elections are one key mechanism to enforce accountability. In the view of the HRC, “genuine” periodic elections in accordance with article 25 (b) “are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them.”⁹² Periodicity of elections is essential to ensure accountability.⁹³ In between elections, referenda or recalls of elected officials are other possible instruments to ensure accountability. Further, accountability implies “answerability,” i.e. the obligation to provide information and explanation.⁹⁴ In this respect, accountability entails a “public right of access to information about the activities of government, the right to petition government and to seek redress through impartial administrative and judicial mechanisms.”⁹⁵ In addition to these general obligations, international law protects key features of accountability, such as genuine elections, separation of powers, and transparency, which have been discussed above.

It is important to note that there is no minimum standard as to the degree to which the legislature is supervised by and accountable to the judiciary. While in most States constitutional courts have the right to review whether parliamentary legislation is in line with the constitution, this is not the case everywhere and is subject to diverging constitutional traditions.⁹⁶

3.8. MEDIATORS OF VERTICAL ACCOUNTABILITY

Although pivotal, elections alone are not sufficient to hold public officers accountable. Elections occur only at the end of the term—typically every 2–5 years. Usually, individual citizens cannot forcefully formulate and advocate interests, beliefs, etc. vis-à-vis the State. For these reasons, free political parties, civil society organisations, and the media are indispensable to ensure vertical accountability. In addition, the right to demonstrate—as protected by freedom of assembly—is another essential element of vertical accountability, which is protected by international law.

91 Nowak, *CCPR Commentary*, 570.

92 HRC, General Comment 25, para. 9.

93 See below.

94 O'Donnell distinguishes answerability and enforcement as the two main aspects of accountability. O'Donnell “Horizontal Accountability in New Democracies,” in Schedler, Diamond, and Plattner (eds.), *Conceptualizing Accountability*.

95 Meyer-Resende, *Democracy Revisited*.

96 Democracy Reporting International, “Discussing International Standards for Democratic Governance.”

3.8.1. Political Parties

Article 22 of the ICCPR guarantees the right to freedom of association, which includes the right to establish and operate political parties. According to article 22, freedom of association may only be restricted by law and 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.” Articles 20 of the UDHR, 11 of the ECHR, 10 of the ACHPR, and 16 of the ACHR also guarantee freedom of association.

The HRC has not adopted a General Comment on article 22 but has specified, to some extent, the right to establish and operate political parties through case law. According to this case law, registration of political parties should be restricted only on narrow and clear grounds; state authorities should treat political parties equally; State parties must refrain from harassing political parties; and State parties must allow multiparty systems:

- **Registration of political parties:** The absence of regulation or legislation governing the creation and registration of political parties “runs counters to the provisions of article 25 ICCPR, as it may adversely affect the rights of citizens to participate in the conduct of public affairs through freely chosen representatives....”⁹⁷ In its Concluding Observations on Rwanda, the HRC “finds cause for concern in the reported obstacles to the registration and freedom of action of human rights NGOs and opposition political parties (articles 19, 22, 25 and 26).”⁹⁸ With respect to Uzbekistan, it held: “The Committee is deeply concerned about excessively restrictive provisions of Uzbek law with respect to the registration of political parties as public associations, by the Ministry of Justice (article 6 of the Constitution, Political Parties Act of 1991). These provisions could easily be used to silence political movements opposed to the Government, in violation of articles 19, 22 and 25 of the Covenant.”⁹⁹
- **Equal treatment:** In general terms, the HRC noted in its concluding observations on Rwanda that “all political parties should be treated on an equal footing and be offered equal opportunities to pursue their legitimate activities, in accordance with the provisions of articles 25 and 26 of the Covenant.”¹⁰⁰ More specifically on broadcasting time, the HRC noted that opposition parties in Gambia “are routinely disadvantaged and discriminated against in their activities, for example by denial or serious limitation of the possibility of radio or television broadcasts.”¹⁰¹
- **Harassment:** In the case of Equatorial Guinea,¹⁰² the HRC regrets the continuing harassment of political opponents through, inter alia, detentions, fines, and difficulty finding

97 HRC, Concluding, Democratic People's Republic of Korea (2001), point 25.

98 HRC, Concluding Observations, Rwanda (2008-2009), para. 21.

99 HRC, Concluding Observations, Uzbekistan (2001): point 23.

100 HRC, Concluding Observations, Rwanda (2008-2009), para. 21.

101 HRC, Concluding Observations, Gambia (2004), para. 23.

102 HRC, Concluding Observations, Equatorial Guinea (2004), para. 12, 13.

employment or leaving the country to attend meetings abroad.

- **Multiparty system:** The absence of political parties or existence of one party has been a concern of international bodies.¹⁰³ In the case of *Bwalya v. Zambia*, the HRC held that restrictions on political activity outside the only recognized political party are incompatible with article 25.¹⁰⁴ In its concluding observations on Kuwait, the HRC expressed concerns about the absence of political parties.¹⁰⁵ In the case of Equatorial Guinea,¹⁰⁶ the HRC welcomed the introduction of a multiparty system. In General Comment 25, the HRC noted that the right to freedom of association, including the right to form and join organizations and associations concerned with political and public affairs, is an essential adjunct to the rights protected by article 25. General Comment 25 adds that political parties (plural) and membership in parties play a significant role in the conduct of public affairs and the election process. While these decisions make a strong case for multiparty pluralism, Nowak argues that one-party systems may be permissible in very exceptional circumstances; other authors even contend that one party systems are still compatible with the ICCPR.¹⁰⁷
- **Internal-party democracy:** International law establishes that political parties should also be governed by article 25 principles. As outlined in General Comment 25, “[s]tates should ensure that, in their internal management, political parties respect the applicable provisions of article 25 in order to enable citizens to exercise their rights thereunder.”¹⁰⁸ This entails—at least—democratic elections of boards that remain accountable to party members. It also requires transparent and inclusive decision-making processes.
- **Banning of political parties:** Only in the case of *M.A. v. Italy* has the HRC dealt with the banning of a political party—the former fascist party of Italy.¹⁰⁹ It held that the ICCPR justifies the prohibition of political parties that wished to eliminate democratic freedoms and establish a totalitarian regime. The HRC has been criticized for the decision on the grounds that it should have requested more information on the fascist party’s activities and should have considered this information at the merit stage.¹¹⁰ The European Court of Human Rights, in contrast, has decided a number of times on the prohibition of political parties.¹¹¹

In **conclusion**, international law as developed by the HRC provides for relatively detailed protection against state interference in the activities of political parties. As a general principle, case law requires that restrictions on the registration and operation of a political party, as well as prohibitions on parties, should be narrowly constructed and proportional. However, international law on political parties suffers from the absence of General Comments and a relatively small number of cases. The framework would therefore benefit from more explicit guidance on, *inter alia*:

- **Banning of political parties:** HRC views contain little guidance and have not elaborated on specific requirements regarding the banning of political parties.
- **Internal-party democracy:** General Comment 25 contains a general principle that political parties must ensure internal-party democracy, i.e. the party must be accountable to its members. However, the HRC or other relevant bodies have not developed detailed requirements for internal-party democracy. The HRC case law is silent on the internal functioning of political parties.

The Council of Europe’s Venice Commission “Guidelines and Explanatory Report on Legislation on Political Parties: Some Specific Issues” provides further elaboration of standards related to political parties and could inform discussions on drafting General Comments on articles 21 and 22.¹¹²

3.8.2. Civil Society Organisations

Like political parties, article 22 of the ICCPR protects the rights of citizens to register and operate civil society organisations (CSOs), which include, for example, trade unions, business associations, or human rights NGOs. Although CSOs do not stand for election, they serve to organise and mediate political, economic, social, and other interests vis-à-vis the State. In any democracy CSOs play a key role as vertical mediator between the State and citizens.

In its case law, the HRC has developed principles for CSOs similar to those regulating political parties. In general terms, the HRC has stressed that the “free functioning of non-governmental organizations is essential for protection of human rights.”¹¹³ In more detail, the HRC has developed requirements for CSO registration and operation. It has also criticized onerous registration procedures for non-governmental organisations, as well as cases of intimidation and harassment of human rights activists in Belarus.¹¹⁴ In its Concluding Observations on Rwanda,¹¹⁵ the HRC found “cause for concern in the reported obstacles to the registration and freedom of action of human rights NGOs and opposition political parties” (articles 19, 22, 25 and 26 of the ICCPR).

103 See e.g. HRC, Concluding Observations, Kuwait (2000), point 42.

104 HRC, *Chiko Bwalya v. Zambia*.

105 HRC, Concluding Observations, Democratic People’s Republic of Korea (2001), para. 25.

106 HRC, Concluding Observations, Equatorial Guinea (2004), para. 12, 13.

107 Nowak, *CCPR Commentary*, 584; Steinorth, *Democratic Governance and International Law*, 54.

108 HRC, General Comment 25, para 26.

109 HRC, *M.A. v. Italy*.

110 Joseph, Schultz and Castan, *The International Covenant on Civil and Political Rights*, 534.

For an overview, see OSCE, “Existing Commitments for Democratic Elections,” 64.

111 *Ibid.*

112 Venice Commission, “Guidelines on Political Parties.”

113 HRC, Concluding Observations, Belarus, para. 19.

114 HRC, Concluding Observations, Belarus, para. 19.

115 HRC, Concluding Observations, Rwanda (2008-2009), para. 21, (emphasis added).

In establishing broad requirements for the registration and free operation of NGOs, the HRC has created a general framework for important elements of NGO activities. However, this framework would benefit from more detailed guidance, particularly on issues such as unhindered operation, fair registration processes, taxing and funding of NGOs, and cooperation with foreign partners and donors.

Guidance on funding and cooperation with foreign partners and donors are particularly relevant. A new General Comment on article 22 could address these gaps. To some extent, discussions on minimum standards for CSO activities could be informed by relevant OSCE commitments. In developing such commitments, OSCE participating States have agreed that NGOs “are an integral component of strong civil society”¹¹⁶ and indicated that they “will facilitate the ability of such institutions to conduct their national activities freely”¹¹⁷ and that the “OSCE will continue to support and help strengthen civil society organisations.”¹¹⁸

3.8.3. Media

Article 19 (2) of the ICCPR protects the freedom of media, one of the cornerstones of a democratic society.¹¹⁹ The HRC has spelled out freedom of media and press in numerous cases, most recently in General Comment 34,¹²⁰ which states that the ICCPR implies “a free press and other media able to comment on public issues without censorship or restraint.”

In more specific terms, General Comment 34 requires that State parties take particular care to encourage independent media, including internet media. State parties should also ensure that public broadcasting services operate in an independent manner and should provide funding in a manner that does not undermine their independence. General Comment 34 also elaborates on article 19 (3) of the ICCPR, which regulates restrictions on the freedom of expression and media. Examples of incompatibility with article 19 (3) include:

- Refusing to permit the publication of newspapers and other print media other than that which is justified under paragraph 3;
- Imposing discriminatory, non-transparent, onerous licensing conditions and fees on the broadcast media;
- Maintaining monopoly control over the media or allowing undue media dominance or concentration by privately controlled media groups;
- Penalising a media outlet, publisher, or journalist solely for being critical of the government or the political social system;

¹¹⁶ OSCE, “Istanbul Document” (1999), point 27.

¹¹⁷ OSCE, Moscow Document, Point 43.

¹¹⁸ OSCE, “Strategy to Address Threats to Security and Stability in the Twenty-First Century,” point 36.

¹¹⁹ HRC, General Comment 34, *Marques de Morais v. Angola*, No. 1128/2002.

¹²⁰ HRC, General Comment 25, para. 25; HRC, GAOR 49th Sess., Supp. No. 40, comments on Jordan, para. 236.

- Introducing discriminatory accreditation schemes; and,
- Restricting the freedom of movement of journalists and human rights investigators within the State (including to conflict-affected locations, the sites of natural disasters, and locations where there are allegations of human rights abuses).

The HRC has elaborated further on the freedom of media in its extensive case law.¹²¹ In the case *Gauthier v. Canada*, for example, the HRC held that the accreditation process of journalists to the press gallery of Parliament must be specific, fair, reasonable, and transparent.¹²² In the case of *Kim v. Republic of Korea*, the HRC required the State party to specify the precise nature of an alleged threat to national security ostensibly posed by the author’s expression of freedom, i.e. publication of views sympathetic to North Korea’s policies.¹²³ The HRC also outlined that underdevelopment or the struggle for national unity would not justify “muzzling advocacy of multi-party democracy.”¹²⁴

Along similar lines, article 13 of the American Convention on Human Rights contains a far-reaching provision in favour of media pluralism: “The right of expression may not be restricted by indirect methods or means, such as the abuse of government or private controls over newsprint, radio broadcasting frequencies, or equipment used in the dissemination of information, or by any other means tending to impede the communication and circulation of ideas and opinions.”¹²⁵ Equally, OSCE participating States “recognize that independent media are essential to a free and open society and accountable systems of government and are of particular importance in safeguarding human rights and fundamental freedoms.”¹²⁶

In light of this comprehensive and fleshed out framework, freedom of media—a cornerstone of democracy and key vertical mediator—is well established. However, while the legal framework appears adequate, implementation is lacking.

3.9. RULE OF LAW

The rule of law constitutes another key feature of a democracy. According to the HRC the rule of law is inherent in the ICCPR.¹²⁷ In the case of Madagascar,¹²⁸ for example, the HRC noted that it “remains concerned by certain dysfunctions in the State party’s judicial system. [...] The State party should ensure the proper functioning of its judicial structures in accordance with

¹²¹ Report of the HRC GAOR 49th Sess., Supp. 40 comments on Cyprus, para. 322; Report of the HRC GAOR 50th Sess., Supp. No. 40 comments on Libya, para. 132.

¹²² HRC, *Gauthier v. Canada*, para. 13.6.

¹²³ HRC, *Kim v. Republic of Korea*.

¹²⁴ HRC, *Womah Mukong v. Cameroon*.

¹²⁵ American Convention on Human Rights. See also Inter-AmCtHR, “La Colegiación Obligatoria de Periodistas,” paras. 18-28; Inter-AmCt.HR, “La Última Tentación de Cristo” (*Olmedo Bustos y otros vs. Chile*)

¹²⁶ OSCE, Moscow Document 1991, point 26.

¹²⁷ HRC, General Comment 29, para. 16.

¹²⁸ HRC, Concluding Observations, Madagascar (2006-2007), para. 24.

the Covenant and with the *principles governing the rule of law*" (emphasis added). Similarly, the Inter-American Court of Human Rights has stressed that "there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law."¹²⁹

For the UN, the Secretary-General defines the rule of law as

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.¹³⁰

Similar points are made in the UN Human Rights Commission's resolution on "Democracy and the Rule of Law":

The rule of law as an inherent element of democracy also means that the will of the majority has limits, not only in the form of universal human rights, but also in the constitutional framework of a state. For example, referenda should not be used to trump constitutional provisions.¹³¹

The rule of law, essentially the supremacy of law, is a fundamental principle protected by international law. It is therefore well established and guaranteed not only by international law but also by national constitutions. The more specific features of the rule of law, such as the independency of the judiciary, are protected by other specific provisions of the ICCPR or other international human rights treaties, as discussed above.

3.10. RIGHT OF SELF-DETERMINATION: A SUPER-NORM GUARANTEEING DEMOCRATIC GOVERNANCE?

Articles 1 of the ICCPR and of the International Covenant on Economic, Social and Cultural Rights protect the right of self-determination of all peoples. This provision enshrines "an inalienable right of all peoples to freely determine their political status and [to] freely pursue their economic, social and cultural development."¹³² According to General Comment 12, article 1 of the ICCPR requires State parties to "describe the constitutional and political processes which in practice allow the exercise of this right."

There is general consensus that article 1 protects, in basic terms, internal political self-determination, which includes broad autonomy within a state and participation of people in the State's political decision-making process.¹³³ However, it is questionable whether the right to determine one's political status inevitably entails democratic governance. On the one hand, only democracies allow peoples to freely determine their political status. On the other hand, article 1 does not mention democracy or even stipulate that democracy is the only form of governance compatible with the ICCPR. It therefore seems compatible with the right of self-determination if people freely choose non-democratic forms of governance. However, it seems very unlikely that the free choice of a non-democratic government would be compatible with the political rights of the ICCPR, in particular articles 19, 21, 22, or 25. In addition, such a choice is unlikely to be compatible with article 1 itself because the choice of a non-democratic system at one point in time potentially pre-empts the possibility of changing this decision in the future. Therefore, Nowak's opinion—namely that the right of internal political self-determination is based on democracy, which is to be exercised together with the ICCPR's other political rights and freedoms—appears to be more compelling.¹³⁴ This interpretation is also implied by General Comment 12, which states that the right of self-determination "and the corresponding obligations concerning its implementation are interrelated with other provisions of the Covenant and rules of international law." In consequence, an isolated understanding of article 1, which could be used to justify authoritarian regimes, is not in line with the ICCPR as a whole.

This understanding of article 1 is based on a systematic interpretation of the ICCPR, but is not supported by HRC views. The HRC has been largely silent on the exact content of article 1, especially in the context of the individual complaints procedure where the HRC has systematically refused to examine complaints based solely on article 1, arguing that the First Option Protocol procedure of the ICCPR is reserved for individuals and that, consequently, only individual rights recognised in part III of the ICCPR can be invoked.¹³⁵ In the absence of elaborated HRC jurisprudence and rather vague General Comments, it would be helpful if the HRC could state that the right of self-determination must be interpreted in conjunction with the ICCPR political rights.

129 Inter-AmCtHR, *Habeas Corpus in Emergency Situations*, paras. 24 and 26.

130 UNSG, *Report on The Rule of Law*.

131 UN Commission on Human Rights, Resolution 2005/32, "Democracy and the Rule of Law," (2005). The Venice Commission notes "that the use of referendums must comply with the legal system as a whole and especially the rules governing the revision of the Constitution," Venice Commission, *Guidelines for Constitutional Referendums at National Level*, point B.3.

132 HRC, General Comment 12.

133 Nowak, *CCPR Commentary*, 24.

134 Nowak, *CCPR commentary*, 24.

135 Batalla, "The Right of self-determination."

4. GENUINE ELECTIONS IN INTERNATIONAL LAW

Article 25 of the International Covenant on Civil and Political Rights lays the foundation for citizen participation in the public affairs of their country. It states:

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.¹³⁶

Importantly, article 25 includes rights for citizens as well as obligations on the State. These obligations are both obligations of conduct (i.e. those that require the State to take certain steps, like hold periodic elections using the secret ballot) and obligations of result (in which the State is obliged to ensure certain standards are met through active implementation of rights, specifically to ensure that the elections are a genuine and a free expression of the will of the people). The fulfilment of the article 25 rights of citizens is inextricably linked to the State meeting its obligations with regard to process. The Inter-American Court of Human Rights made this link explicit when considering the American Convention on Human Rights in *Castenada Gutman v. Mexico*:

The political and other rights established in the Convention (...) are rights that “cannot be merely by virtue of the provisions that embody them, because they are, by their very nature, ineffectual without a detailed normative regulation, and even without a complex institutional, economic and human apparatus that endows them with the effectiveness they claim, as rights under the Convention[...]; if there were no electoral codes or law, electors’ lists, political parties, propaganda media and mobilization, polling stations, electoral boards, dates and times for exercising the vote, the right could simply not be exercised, due to its very nature...”¹³⁷

Because article 25 rights require that the state conduct genuine and periodic elections in order for the fundamental rights to vote and to be elected to be fulfilled, international law (treaties and subsequent interpretation by bodies such as the Human Rights Committee) includes an implicit understanding of the key elements that constitute the electoral process. These include: (1) legal framework for elections; (2) electoral systems; (3) boundary

delimitation; (4) election management; (5) voter registration; (6) voter education; (7) candidacy (8) campaigning; (9) campaign finance; (10) voting processes; (11) counting and tabulation; (12) dispute resolution; (13) the media; and, (14) verification of election processes. Because article 25 rights cannot be completely separated from the process through which they are enjoyed, this section of the study focuses both on analysis of article 25 itself and on the status of these fourteen elements of the election process in international law.

4.1. GENUINE ELECTIONS THAT GUARANTEE THE FREE EXPRESSION OF THE WILL OF THE VOTERS

Article 25 (b) establishes the right of citizens to a genuine election that guarantees the free expression of the will of the voter.¹³⁸ This article places an obligation on the State not only to ensure the procedural aspects of the electoral process but also that the outcome of the election is “genuine.” Article 25 does not define the term “genuine.” However, over time, the term “genuine elections” has come to be understood as elections that are competitive and offer voters a real choice, where other essential fundamental rights are fulfilled, where the will of the voters is freely expressed, and where votes are counted honestly and accurately.¹³⁹

In General Comment 25, the HRC elaborates on the need for genuine elections to guarantee the free expression of the will of the voters, noting that at the very least, elections must be held often enough to ensure that governmental authority continues to reflect the will of the people, which is the basis of governmental legitimacy.¹⁴⁰ As the UN Handbook on Human Rights and Elections points out, “the requirement that elections be free and fair is also an easily identifiable international norm. Any measures which could have the effect of circumscribing or frustrating the will of the people would, of course, violate the Universal Declaration of Human Rights and render the elections unfair.”¹⁴¹

At the regional level, a number of instruments reiterate that citizens must be able to freely express their will in order for a democratic election to be successful. The African Union (AU) notes that “democratic elections are the basis of the authority of any representative government”¹⁴² and encourages State parties to “promote...a system of governance that is representative.”¹⁴³ The Organization of American States’ (OAS) American Convention on Human Rights (ACHR) asserts that elections should guarantee the free expression of the will of the voters¹⁴⁴ while its Inter-American Democratic Charter explains that an essential element of a representative democracy includes “the holding of periodic, free and fair elections based on secret balloting and universal

138 ICCPR, article 25 (b).

139 UDHR, article 21(3); ICCPR, article 25 (b); ACHR, article 23 (1) (b); OSCE, Copenhagen Document, paras. 6. and 7.4; UN, Resolution 2005/32. See also Nowak, *CCPR Commentary*, 575.

140 HRC, General Comment 25, para. 9.

141 UN, Handbook on Elections, para. 63.

142 AU, Declaration on the Principles Governing Democratic Elections, article 1. 8.

143 AU, ACDEG, article 3 (3).

144 OAS, ACHR, article 23 (b).

136 UN, ICCPR, article 25 (b)

137 Inter-American Court of Human Rights, *Castenada Gutman v. Mexico*, para. 159

suffrage as an expression of the sovereignty of the people.”¹⁴⁵ Critical to ensuring the free expression of the will of the voter is the ability to vote free from intimidation and coercion and to form opinions independently.¹⁴⁶

While the HRC has clearly stated that the “results of genuine elections should be respected and implemented,”¹⁴⁷ it has not explicitly stated the requirement that the candidate with the most votes wins or that, in a proportional representation system, seats are allocated in proportion to the number of votes won.¹⁴⁸ This gap in the current General Comment should be addressed.

In **conclusion**, it is clear that nations are in broad agreement that the free expression of the will of voters is fundamental to ensuring a democratic electoral process takes place. What is less clear is a definition of the term “genuine election.” A future General Comment on article 25 could help to elucidate this important issue. The definition could include an explicit requirement that votes be counted accurately and honestly; that the process be competitive and open; that the will of the people should be freely expressed; and that a range of other fundamental rights should be fulfilled. In addition, a future General Comment could clarify that the “will of the people” means that the candidate/party with the highest number of votes should win the electoral contest, and that in proportional representation systems seats are assigned proportionate to the number of votes cast.

4.2. PERIODIC ELECTIONS

Article 25(b) of the ICCPR establishes that elections should not be a one-off event but rather a regular means (established by law) for the citizens of a country to hold their government accountable. The HRC has interpreted this to mean that the interval between elections should not be unduly long such that the authority of the government is no longer representative of the will of the electors.¹⁴⁹ While the HRC does not make specific recommendations regarding an appropriate interval between elections, a period of between two and six years (depending on the office) is common practice and considered reasonable.¹⁵⁰

At the regional level, both OAS and AU documents reflect the obligation to hold periodic elections as well.¹⁵¹ In the Inter-American Democratic Charter, the OAS states that “[e]ssential

145 OAS, IADC, article 3; See also OSCE, *Copenhagen Document*, paras. 5.1 and 6.

146 HRC, General Comment 25, paras. 11 and 19.

147 HRC, General Comment 25, para. 19.

148 International law recognizes the value of quotas in promoting an inclusive electoral process. The use of such quotas would not necessarily be counter to this principle.

149 HRC, General Comment 25, para. 9.

150 Nowak, *CCPR Commentary*, 575; OSCE, *Guidelines to Assist National Minority Participation*, 17.

151 OAS, ACHR, article 23(1b) (noting that all citizens have a fundamental right to vote and to be elected in genuine periodic elections). See also “Essential elements of representative democracy include...the holding of periodic, free and fair elections...” OAS, IADC, article 3; “State Parties shall implement this Charter in accordance with the following principles: 4. Holding of regular, transparent, free and fair elections.” AU, ACDEG, article 3(4)., “Regular elections constitute a key element of the democratization process...” AU, Declaration on the Principles Governing Democratic Elections in Africa, article 2.

elements of representative democracy include...the holding of periodic, free and fair elections...”¹⁵² Additionally, in its African Charter on Democracy, Elections and Governance (ACDEG) the AU states that “State Parties shall implement this Charter in accordance with the following principles: ...4. Holding of regular, transparent, free and fair elections.”¹⁵³

4.2.1. Postponement of Elections and States of Emergency

Article 25 does not explicitly address the postponement of elections for either short or long periods of time. Long postponements that serve to undermine the ability of the citizens to hold their government accountable are likely in contravention of article 25.¹⁵⁴ However, the ICCPR’s general guidance regarding the situations under which it is permissible for States to derogate from their human rights obligations also applies to electoral rights, i.e. when there is a state of emergency which threatens the life of the nation and whose existence is officially proclaimed.

That being said, international law does not address whether elections should ever actually be held in times of national emergency. While elections technically may be possible under a state of emergency, one could argue that the restrictions placed on fundamental rights in such circumstances would prevent a genuine election from taking place. This issue could be addressed in a future General Comment on article 25 rights.

In **conclusion**, international law clearly establishes that elections should be held periodically, but the State maintains discretion to determine the permissible interval between elections. Greater clarity regarding the permissible intervals between elections as well as the circumstances in which genuine elections should not or cannot be held (such as during a state of emergency or armed conflict) would be helpful.

4.3. SECRET BALLOT

Voting by secret ballot is widely recognized as an essential means of ensuring that the will of the people is expressed freely during electoral processes. The UDHR established that “elections...shall be held by...secret ballot that guarantees free expression of the will of the voters or other free voting procedure.”¹⁵⁵ The ICCPR as well as regional instruments such as the American Convention on Human Rights and the European Convention on Human Rights reiterated this obligation.¹⁵⁶ The African Charter on Human and Peoples’ Rights, which does not address the secrecy of the ballot, offers a notable exception.¹⁵⁷

152 OAS, IADC, article 3.

153 AU, ACDEG, article 3 (4).

154 HRC, Concluding Observations: Republic of Congo (2000).

155 UDHR, article 21 (3).

156 “Every citizens 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.” OAS, AmCHR, article 23.

157 AU, African Charter on Human and Peoples’ Rights, article 13 (1).

The HRC has expanded on the secrecy of the ballot, stating that it requires that voters be free from “any form of coercion or compulsion to disclose how they intend to vote or how they voted.”¹⁵⁸ This includes during absentee voting.¹⁵⁹ In addition, the HRC goes further to state that the right to vote secretly cannot be waived by the voter. It is therefore considered a violation of secrecy of the ballot when voters themselves disclose how they voted, how they intended to vote, or, presumably, when they take actions that would allow that information to become public.¹⁶⁰ This calls into question whether the practice of proxy voting is permissible under international law.

Additionally, the HRC stipulates that States should take measures to ensure that the secrecy of the ballot is upheld throughout the voting process.¹⁶¹ Such measures would presumably include the use of secrecy screens or booths, ensuring that voters themselves put the ballot into the ballot box, and ensuring that a specific voter cannot be identified with a particular cast ballot etc.¹⁶² At the moment, there is little in international law that addresses the specific challenges posed by new voting technologies with regard to ballot secrecy and other fundamental rights and freedoms (please see section 4.14 below).

International law does foresee the need for assisted voting for persons with disabilities, who are blind, or who are illiterate.¹⁶³ General Comment 25 states that assistance provided should be “independent,” and electors should be fully informed of these guarantees.¹⁶⁴ In such cases, the right to vote supersedes the right to secrecy.

In **conclusion**, while the concept of the secret ballot is generally well-established in international law, a new or revised General Comment could address procedures required to guarantee the secrecy of the ballot. Such measures could include those outlined above—the use of privacy screens and booths, requiring that voters put their ballots in the ballot box themselves, etc. Greater clarity regarding the impact of electronic voting technologies and the use of proxy voting in the fulfilment of the right to a secret ballot would be beneficial as well.

4.4. UNIVERSAL SUFFRAGE

The obligation to hold elections by universal suffrage appears in the ICCPR and other instruments,¹⁶⁵ and requires that “the right to vote...not be restricted to certain groups or classes, but rather is a basic right of individuals.”¹⁶⁶ In addition, the State must take steps to ensure that the broadest eligible pool of voters be allowed to cast ballots. The reasonable (and unreasonable) restrictions on the right to vote that are outlined below also apply to universal suffrage. At the regional level, the American Convention of Human Rights and the African Charter on Democracy, Elections and Governance guarantee universal suffrage.¹⁶⁷

4.5. THE RIGHTS TO VOTE AND TO BE ELECTED

Article 25 (b) of the ICCPR requires that citizens have the opportunity to vote and to be elected in elections held by universal and equal suffrage. These procedural obligations protect the rights of the citizenry as a whole, exercised by individuals through the intrinsically linked rights to vote and to be elected.¹⁶⁸ The ICCPR reflects the text of the Universal Declaration of Human Rights (UDHR), which is commonly accepted as international customary law.

Regional treaties also include provisions for citizens to vote and to be elected or to participate in elections, although the scope and content of these provisions varies. The American Convention on Human Rights mirrors the rights codified in article 25 of the ICCPR, stating that every citizen has the right “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.”¹⁶⁹

Similarly, the Arab Charter on Human Rights states: “Every Citizen has the right...[t]o stand for election or choose his representatives in free and impartial elections, in conditions of equality among all citizens that guarantee the free expression of his will.”¹⁷⁰

Interestingly, the European Convention for the Protection of Human Rights and Fundamental Freedoms, which was drafted and entered into force between the commemoration of the UDHR in 1948 and the drafting and entry into force of the ICCPR (1966 and 1976 respectively), did not include the right to vote and to be elected. Only with Optional Protocol 1 to the Convention were electoral rights addressed. Even then, the rights to vote and to be elected are only implicitly protected, and only in the context of choosing members of the legislature: “The High Contracting

158 HRC, General Comment 25, para. 20.

159 HRC, General Comment 25, para. 20.

160 “Waiver of these rights [the right to secrecy of the ballot] is incompatible with article 25 of the Covenant.” HRC, General Comment 25, para. 20.

161 HRC, General Comment 25, para. 20.

162 See for example the case of Lebanon, where standardized ballot papers are not provided by the State. Rather, political parties pre-print ballots to give to voters for use on election day. These ballots can bear markers - for example, be printed on colored paper - that can be identified with specific voters or groups of voters, thereby undermining the secrecy of the ballot during the vote counting process.

163 HRC, General Comment 25, para. 20.

164 HRC, General Comment 25, para. 20.

165 “Every citizen has the right to vote and 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 voter.” UN, ICCPR, article 25 (b). See also UN, ICERD, article 5(c); AU, ACDEG, article 4 (2); OAS, IADC, article 3, OAS, ACHR, article 23 (b).

166 Nowak, *CCPR Commentary*, 576.

167 OAS, ACHR, article 23; AU, ACDEG, article 4 (2).

168 “Every citizen has the right to vote and 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 voter.” ICCPR, article 25 (b).

169 AmCHR, article 23 (b).

170 LAS, Arab Charter on Human Rights (2008), article 24 (3).

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.”¹⁷¹

Similarly the African Charter on Human and Peoples’ Rights does not explicitly establish the rights to vote and to be elected but states that “[e]very citizen shall have the right to participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”¹⁷² A number of key issues regarding these rights are detailed in the sub-sections below.

4.5.1. Citizenship

Citizenship, and the establishment of its parameters, has historically been left to the discretion of the State (subject to non-discrimination requirements).¹⁷³ However, international human rights law is reconstructing the relationship between the State and the individual citizen, bringing citizenship into the realm of international debate through dispute mechanisms that reach beyond the domestic arena.¹⁷⁴ In the consideration of complaints, including those related to participatory rights, treaty bodies such as the HRC have begun to bring citizenship slowly under the purview of international law.¹⁷⁵

Unlike most other human rights in the ICCPR and other UN documents, the rights to vote and to be elected are restricted to citizens rather than any person within the boundaries or jurisdiction of the country. General Comment 25 is clear that distinctions should not be made between naturalized and other citizens in the exercise of their article 25 rights¹⁷⁶ and citizenship requirements should be clearly established in law.¹⁷⁷ However, the impact of joint citizenship on the rights to vote and to be elected remains unclear in international law.

The right of the citizen to participate in public affairs is protected at the regional level in the African Charter on Human and Peoples’ Rights¹⁷⁸ and the American Convention on Human Rights.¹⁷⁹ A number of related issues regarding the rights to vote and to be elected are outlined below.

Non-discrimination: Article 25 of the ICCPR is clear that the rights to vote and to be elected should be enjoyed by citizens without discrimination on the basis of race, colour, sex, language, religion,

political or other opinion, national or social origin, property, birth, or other status. In *Toonen v. Australia*, the HRC added to this list discrimination on the basis of sexual orientation.¹⁸⁰ Other UN treaties such as the Convention on the Elimination of Discrimination Against Women (CEDAW),¹⁸¹ the Convention on the Political Rights of Women,¹⁸² the International Covenant on the Elimination of Racial Discrimination (ICERD),¹⁸³ the International Convention on the Protection of Rights of Migrant Workers,¹⁸⁴ and the Convention on the Rights of Persons with Disabilities¹⁸⁵ make explicit that every “citizen” includes women, minorities, migrant workers, and persons with disabilities and that these groups should not suffer discrimination in the enjoyment of their rights.

Long-term residents: In General Comment 25, the HRC implied that long-time residents—even as non-citizens—may be entitled to vote and to be elected in local elections.¹⁸⁶ This is reinforced at the regional level in the Council of Europe’s Convention on the Participation of Foreigners in Public Life at the Local Level which states that “[e]ach Party undertakes, subject to the provisions of article 9, paragraph 1, [state of emergency] to grant to every foreign resident the right to vote and to stand for election in local authority elections, provided that he fulfils the same legal requirements as apply to nationals and furthermore has been a lawful and habitual resident in the State concerned for the 5 years preceding the elections.”¹⁸⁷ The HRC could provide greater clarity or more explicit guidance on the rights of long-term residents to participate in public affairs and what constitutes a reasonable duration of residency for the enjoyment of these rights.

Internally Displaced People: International law increasingly includes explicit statements regarding the rights of internally displaced people (IDPs) to participate in the public affairs of

180 HRC, *Toonen v. Australia*.

181 “States shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure 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.” UN, CEDAW, article 7.

182 “Women shall be entitled to vote in all elections on equal terms with men, without any discrimination.” UN, Convention on the Political Rights of Women, article 1.

183 “In compliance with the fundamental obligations laid out 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... 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.” UN, ICERD, article 5 (c).

184 “Migrant workers and members of their families shall have the right to participate in public affairs of their State of origin and to vote and to be elected at elections of that State, in accordance with its legislation.” UN, International Convention on the Protection of the Rights of Migrant Workers article 41(1).

185 “To ensure that persons with disabilities can effectively and fully participate in political and public life on an equal basis with others, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected,” UN, Convention on the Rights of Persons with Disabilities, article 29.

186 “State reports should indicate whether any groups such as permanent residents, enjoy these rights on a limited basis, for example, by having the right to vote in local elections or to hold particular public service positions.” HRC, General Comment 25, para. 3.

187 CoE, Convention on the Participation of Foreigners in Public Life, article 6(1).

171 CoE, ECHR, Optional Protocol 1, article 3.

172 AU, AfCHPR, article 13

173 Spiro, “A New International Law of Citizenship,” 624; Nowak, *CCPR Commentary*, 568.

174 Namely through courts like the European Court of Human Rights, and treaty monitoring bodies like the United Nations Human Rights Committee which, under optional protocol 1, can hear individual complaints.

175 Spiro, “A New International Law of Citizenship.”

176 HRC, General Comment 25, para. 3.

177 HRC, General Comment 25, para. 3.

178 AU, ACHPR, article 13 (1).

179 OAS, ACHR, article 23 (1).

their country. The United Nation's Guiding Principles on Internal Displacement states:

Internally displaced persons, whether or not they are living in camps, shall not be discriminated against as a result of their displacement in the enjoyment of the following rights: ... (d) The right to vote and to participate in governmental and public affairs, including the right to have access to the means necessary to exercise this right.¹⁸⁸

These principles have been reiterated by the HRC in its Concluding Observations on the 2004 report submitted by Colombia in which the Committee expressed concern regarding the “difficulties experienced by internally displaced persons in exercising their civic rights, especially the right to vote,” and went on to recommend that Colombia take “the necessary steps to ensure that displaced persons are able to exercise the rights guaranteed in article 25.”¹⁸⁹

At the regional level, the African Union Convention for the Protection and Assistance of IDPs in Africa stipulates that States should:

Take necessary measures to ensure that internally displaced persons who are citizens in their country of nationality can enjoy their civic and political rights, particularly public participation, the right to vote and to be elected to public office.¹⁹⁰

In addition to ensuring that polling facilities are available for internally displaced persons, and that they are able to register to vote (see section 4.5.3 below), necessary measures include ensuring that IDPs are able to replace (as necessary) any documentation that proves their citizenship.¹⁹¹

Refugees and Asylum Seekers: International law does not provide refugees—as non-citizens—the right to vote or to be elected in the country of asylum. In addition, international law does not explicitly require out-of-country voting. Practice among States in this regard is mixed. If out-of-country voting does take place, it is likely that the article 25 rights of the refugees and asylum seekers should be fulfilled without discrimination on the basis of their status.¹⁹² The HRC could provide explicit guidance regarding out-of-country voting more broadly, and specifically with reference to the rights of refugees, in a future General Comment.

4.5.2. Restrictions on the Rights to Vote and to be Elected

Article 25 (b) of the ICCPR also states that the rights enshrined therein should not be subject to unreasonable restrictions. Any

restrictions placed on the either the right to vote or the right to be elected must be subject to reasonable and objective criteria.¹⁹³ What constitutes unreasonable versus reasonable restrictions is a source of some debate. The burden lies with the State to prove that any restrictions on article 25 rights are objective and reasonable. The HRC outlined several unreasonable and reasonable restrictions, reviewed below, on the right to vote and to be elected in General Comment 25.

Unreasonable Restrictions on the Right to Vote: Unreasonable restrictions on the right to vote include those based on physical disability, educational, or property requirements.

Reasonable Restrictions on the Right to Vote: Reasonable restrictions include citizenship, minimum age, mental incapacity (as established by a court), and criminal conviction.¹⁹⁴ The HRC has been clear that the suspension of the right to vote of convicted criminals should be proportionate in duration to the offense and sentence, and that those who are deprived of liberty but yet to be convicted should maintain their voting rights.¹⁹⁵ In concluding remarks on the report of the United Kingdom, the HRC reiterated this position.¹⁹⁶ Moreover, disenfranchisement following arbitrary arrest and sentencing would not be considered reasonable.¹⁹⁷

Although the minimum age for voting is not explicitly addressed in international law, the age of majority established in the Convention on the Rights of the Child is 18,¹⁹⁸ or younger if national law so dictates. Although state practice varies, 18 is a common voting age.

The HRC has also addressed restrictions based on residency in more detail; however, there remain important ambiguities and gaps that could be addressed in a future General Comment. In General Comment 25, the HRC states that resident requirements should be reasonable and should not “exclude the homeless from the right to vote.”¹⁹⁹ Unaddressed by international law with regard to residency are issues such as the required duration of residency for participation in elections;²⁰⁰ residency requirements with regard to out-of-country voting (specifically how this determines which races a voter can vote in); and out-of-country voting more broadly.

Although it is common practice to restrict the voting rights of members of the military and the police, this issue remains unaddressed by international law. Goodwin-Gill argues that “such limitations, provided they have a rational basis, remain proportional and are not used as a device to disenfranchise

193 HRC, *Debrezény v. Netherlands*; HRC, *Gorji-Dinka v. Cameroon*.

194 HRC, General Comment 25, para. 4.

195 HRC, General Comment 25, para. 14.

196 HRC, Concluding Observations, United Kingdom and UK Overseas Territories (2001).

197 HRC, *Dissanayake, Mudiyansele Sumanaweera Banda v. Sri Lanka*, Communication number 1373/2005.

198 Convention on the Rights of the Child, article 1.

199 HRC, General Comment 25, para. 11.

200 HRC, *Gilot et. Al v. France*.

188 UN, *Guiding Principles on Internal Displacement*, para. 22 (d).

189 HRC, *Concluding Observations, Colombia (2004)*, para. 19.

190 African Union Convention for the Protection and Assistance of Internally Displaced People in Africa, article 9 (l). Please note that this convention is yet to enter into force.

191 *Ibid.* article 13 (2).

192 ICCPR, articles 2 and 25.

significant sections of the population, arguably fall with the margin of appreciation left to States.²⁰¹

Unreasonable Restrictions on the Right to be Elected: General Comment 25 lists unreasonable restrictions on the right to be elected as those based on education, residence, descent, language proficiency,²⁰² religion,²⁰³ political affiliation,²⁰⁴ or the holding of a particular political opinion—in effect expanding upon the list of unacceptable discriminatory practices vis-à-vis the right to vote (for more on independent candidacy please see sub-section 4.5.5). In observations on individual complaints and country reports, the HRC has added to this list language proficiency²⁰⁵ and religion.²⁰⁶ In addition, onerous technical barriers that in effect make the exercise of the right to be elected impossible are counter to article 25 provisions.²⁰⁷

Also added to the list of unreasonable restrictions are single-party electoral systems. In the case of *Bwalya v. Zambia*, the HRC determined that the complainant's article 25 rights were violated when he tried, and was effectively prevented, from running as an opposition candidate under Zambia's one party constitution. The Committee found that “restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right participate in the conduct of public affairs.”²⁰⁸

The American Convention on Human Rights differs from the ICCPR and the interpretations of the HRC in that it considers residency a reasonable restriction on the right to vote.²⁰⁹ Residency requirements are not addressed in the African documents.

Reasonable Restrictions on the Right to be Elected: The HRC argues that “[a]ny restrictions on the right to stand for election ... must be justifiable on objective and reasonable criteria.”²¹⁰ Reasonable restrictions on the right to be elected include citizenship, reaching a minimum age for the office, mental incapacity established by a court, criminal conviction, conflicts of interest (for example, based on employment in the civil service), minimum amount of support from potential voters, or a reasonable monetary fee.²¹¹ (See above sections on reasonable restrictions based on citizenship, minimum voting age, and criminal conviction).

While it is unreasonable to restrict the right to be elected on the

basis of political opinion, it may be possible that restrictions on the article 25 rights of groups with more extreme opinions would be permissible when considered in light of other provisions of the ICCPR, namely article 5 regarding acts aimed at the destruction of rights and freedoms and article 20 regarding advocacy of hatred and incitement to violence.

Regional jurisprudence applies a similar principle to the rights of undemocratically elected political leaders. In the case of *Efrain Rios Montt v. Guatemala*, the Inter-American Commission on Human Rights decided that it was permissible to curtail the right to be elected of a leader of a coup d'état or armed movement that changed the constitutional order.

4.5.3. Compulsory Voting and the Right not to Vote

Compulsory voting and its impact on fundamental rights and freedoms is largely unaddressed by international law, and state practice in this regard varies. While approximately 27 countries include mandatory voting in their laws, their implementation differs.²¹²

Little guidance exists at the treaty level, but relevant case law does emanate from the European Court of Human Rights. In *X v Austria*, the complainant argued that compulsory voting undermined his freedom of thought, conscience, and religion because the ballot paper as presented to voters only included two candidates, neither of whom he thought a “suitable Federal President.” The complainant argued that, given the compulsory nature of the vote, voters should be presented with a “yes/no” option for each candidate. The Court ruled that there was no violation of his rights in this regard—that voting was itself not mandatory, but only that presence at the polling station was compulsory. Once behind the voter screen, the voter may cast a blank ballot and so is not, in effect, actually compelled to vote.²¹³

4.5.4. Voter Registration

Under international law, voter registration is not required to ensure that the fundamental right of citizens to vote is fulfilled. However, it is widely recognized as a means of implementing this right and providing voters with the opportunity to exercise their franchise. In addition, voter registration can establish a reliable framework for the exclusion of ineligible voters. Voter registration is commonly the point at which the reasonable and unreasonable restrictions on the right to vote (as outlined in sub-section 4.5.1 above) come to the fore.

International law does address some of the challenges of voter registration directly. The HRC states in General Comment 25 that if registration is required it should be facilitated and obstacles to it should not be imposed,²¹⁴ and that reasonable residency requirements may be imposed on voters as part of the registration

201 Goodwin-Gill, *Free and Fair* (2nd Ed), 128.

202 HRC, General Comment 25, para. 12.

203 HRC, Concluding Observations, Lebanon.

204 HRC, General Comment 25, para. 15.

205 HRC, *Ignatane v. Latvia*, CCPR/C/72/D/884/1999.

206 HRC, Concluding Observations: Lebanon CCPR/C/79/Add.78.

207 HRC, Concluding Observations, Equatorial Guinea CCPR/CO/79/GNQ and Concluding Observations: Azerbaijan CCPR/CO/C/73/AZE.

208 HRC, *Bwalya v Zambia*, para. 6.6.

209 OAS, ACHR, article 23 (2).

210 HRC, General Comment 25, para. 15.

211 See ICCPR, article 25(b); HRC, *Debrecezeny v. Netherlands*.

212 Malkopoulou, “Participating in EU Elections,” 8.

213 ECtHR, *X v Austria*, App. 4982/71.

214 HRC, General Comment 25, para. 11.

process as long as they do not exclude the homeless.²¹⁵ In addition, “any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced.” Voter registration processes have particular relevance to the exercise of electoral rights by internally displaced persons (as outlined in section 4.5.2 above).

When voter registration is a component of the electoral process, steps should be taken to ensure that it upholds and advances key electoral rights. Registration processes cannot be conducted in such a way that they discriminate against groups of voters, thereby undermining the obligation of universal suffrage.²¹⁶ Building on this, and implicit in international law, is the understanding that the right to vote in elections must be protected by means of access to information by ensuring that the data included in the voter register is accurate, current, and publicly available.²¹⁷ This requires that citizens have adequate time to review the data included in the voter register in advance of election day and have it promptly rectified as needed.²¹⁸ Importantly, the requirement that voter registration data be accurate requires that it also be current; it is therefore critical that voter registration processes be undertaken regularly. All of these issues could be addressed more explicitly in a new or revised General Comment.

4.5.5. Candidacy

The right to be elected is firmly established in international law, both in UN instruments and in the instruments of regional organizations (see above), and is central to the key democratic principle of pluralism.²¹⁹ The meaningful exercise of this right is dependent on a number of other rights, such as freedom of association, freedom of assembly, freedom of expression and opinion, and freedom of movement. The interrelationship between the right to be elected and these other fundamental rights and freedoms are most clearly seen in the context of candidacy requirements and the campaign period.

Independent Candidacy: International law establishes that no one shall be compelled to join a political association.²²⁰ General Comment 25 elaborates on this, stating that “persons who are otherwise eligible to stand for election should not be excluded by unreasonable or discriminatory requirements such as...political affiliation.”²²¹ This, alongside the right to be elected, implies the right of citizens to stand as independent candidates. A clear and explicit provision regarding the right of non-party candidates to stand in elections would be beneficial.

²¹⁵ HRC, General Comment 25, para. 11.

²¹⁶ ICCPR, articles 2 and 25.

²¹⁷ ICCPR, article 25 (b).

²¹⁸ UNGA, Guidelines Concerning Computerized Personal Data Files, article 4; see also right to effective remedy and the right to access information, ICCPR, articles 2 and 19; HRC, General Comment 34, para. 18; Inter-AmCtHR, *Marcel Claude Reyes, et al. v Chile*.

²¹⁹ ICCPR, article 25 (b); OAS, AmCHR, article 23 (b); AU, AfCHPR, article 13 (1); See also, HRC, Concluding Observations, Egypt (2002) CCPR/CO/76/EGY.

²²⁰ UDHR, article 20 (2); HRC, General Comment 25, para. 17.

²²¹ HRC, General Comment 25, para. 15.

At the regional level, the Inter-American Court and the Inter-American Human Rights Commission have both determined that it is not in violation of article 23 of the American Convention on Human Rights for the right to be elected to be exercised only through political parties.²²² In *Case Castaneda Gutman v. Mexico*, the Inter-American Court of Human Rights decided that article 23 of the ACHR was not violated by a requirement that candidates exercise their right to be elected through political parties, as long as the parties do not apply undue restrictions in the process of candidate selection.²²³ In a challenge to the Argentine election law, the Inter-American Commission on Human Rights found that the refusal to place an independent candidate on the ballot was not a violation of articles 16 (freedom of association) or 23 (the right to be elected) because the law did not specifically require party membership as a prerequisite for nomination as a party candidate, and therefore all citizens had the potential to be nominated.²²⁴

Candidate Registration: Candidates may be required to register prior to participation in an electoral process, and conditions may be placed on the rights of citizens to be elected. These include nomination dates, fees and deposits, and support of a minimum number of voters.²²⁵ Any conditions placed on candidacy should be reasonable, objective, and non-discriminatory, per the reasonable and unreasonable restrictions outlined above.²²⁶

In **conclusion**, the right to vote and to be elected is well established in international law both within UN instruments and those of regional organizations. While international law has furnished examples of reasonable and unreasonable restrictions on the rights to vote and to be elected, a future General Comment on article 25 could add additional detail on this issue. Such a comment could address the following:

- The impact that joint-citizenship may have on the rights to vote and to be elected;
- The rights of long-term residents to participate in public affairs;
- The rights of citizens outside the boundaries of their country, including refugees and asylum seekers, to vote and to be elected in their country of origin;
- The rights of military personnel to vote and whether the ICCPR permits restriction of their rights;
- Whether criminal conviction is, in fact, a reasonable restriction on the right to be elected;
- Residency requirements for voting and standing for election, specifically questions related to duration of residency and

²²² *Case Castanada Gutman v. Mexico* (6/8/08) and *Challenge to Election Law* (Argentina, 9/13/88) Case 10.109, Resolution No. 26/88 respectively.

²²³ Merloe, Legal Framework Handbook citing *Case Castaneda Gutman v. Mexico* (6/8/08), 128.

²²⁴ Merloe, Legal Framework Handbook citing *Challenge to the Election Law*.

²²⁵ HRC, General Comment 25, paras 15–17.

²²⁶ HRC, General Comment 25, para. 16.

the role of residency in determining out-of-country voting rights;

- The rights of citizens to stand as independent candidates, unaffiliated with any political party;
- Whether compulsory voting is compatible with article 25 provisions; and,
- Whether it is permissible to restrict the rights of political parties or candidates who hold “extreme” political views.

In addition, a new General Comment could add specificity to the reporting requirements of States such that the HRC is able to provide additional clarity on outstanding issues regarding the rights to vote and to be elected through Concluding Observations.

4.6. EQUAL SUFFRAGE

Equal suffrage is an essential element of a genuine election, and is recognized as such at the international and regional level.²²⁷ The HRC has elaborated on equal suffrage in General Comment 25, stating that “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.”²²⁸ In other words, not only should each citizen cast an equal number of votes in each electoral race, the bodies elected should also be equally representative of voters from different geographical regions (see below). At a more practical level, this implies that States must take steps to prevent multiple voting (such as ballot box stuffing, or one voter casting more than one ballot) and should also seek equality in the drawing of electoral boundaries.²²⁹

Equal suffrage is protected at the regional level in the American Convention on Human Rights.²³⁰ However, no such commitment exists in Africa. Neither the African Charter on Human and Peoples’ Rights nor the African Charter on Democracy, Elections and Governance contain provisions regarding equal suffrage.

4.6.1. Boundary Delimitation

Boundary delimitation, or redistricting, is an important means of ensuring that equality of suffrage is reflected in the final composition of the elected body. The HRC made the link between boundary delimitation and equal suffrage more explicit, stating that:

The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude

or restrict unreasonably the right of citizens to choose their representatives freely.²³¹

It is clear that there cannot be absolute equality in the population size of different electoral districts; however, what remains unclear, is the degree of deviation in equality that is permissible. In *Matyus v. Slovakia*, the complainant, Matyus, was running for a seat on the Town Council. However, the number of representatives per district was not proportional to the number of inhabitants; in fact, Matyus alleged that the ratio of inhabitants to representative was between 200:1 and 1400:1. The HRC found this to be a violation of Matyus’ article 25 right to equal suffrage.²³²

At the regional level in Europe, the European Court of Human Rights has determined that the right to free elections in the European Convention on Human Rights does not require equal voting influence for all voters.²³³ The Venice Commission has attempted to quantify an acceptable deviation from true equality in the delimitation of boundaries, stating that there should seldom be a difference as high as 10%.²³⁴

Gerrymandering, or the practice of intentionally drawing electoral boundaries so as to advantage one political group at the expense of another,²³⁵ can violate the principle of equal suffrage protected by article 25. However, it can also be used as a means of ensuring minority representation (which would not necessarily be in violation of article 25 rights.) In response to these issues, several States—including the UK and other members of the Commonwealth such as New Zealand, Australia, and Canada, as well as a number of countries in the Caribbean—have introduced impartial boundary delimitation bodies that are responsible for drawing electoral boundaries.²³⁶

In order to ensure that equality of suffrage continues to be upheld by electoral boundaries, it is important that States delimit boundaries periodically. This often occurs in conjunction with a census process. International law does not address how often this should occur and international practice varies widely. Presumably it should occur often enough that elections can be said to truly represent the will of the people. This issue could be clarified in a new or amended General Comment.

In **conclusion**, international law addresses equal suffrage and provides a foundation for sound boundary delimitation processes that uphold this principle. However, more detailed guidance about the implementation of these principles is lacking. Specifically, acceptable deviation from true equality in the delimitation of boundaries and the frequency with which delimitation should occur could be helpfully addressed in an amended General Comment on article 25.

231 HRC, General Comment 25, para. 21.

232 HRC, *Matyus v. Slovakia*.

233 ECtHR, *Liberal Party v. UK*.

234 Venice Commission, *Code of Good Practice in Electoral Matters*, sec. I.2.2.

235 Handley, *Boundary Delimitation*.

236 *Ibid.*

227 ICCPR, article 25 (b); OAS, AmCHR, article 23.

228 HRC, General Comment 25, para. 21.

229 HRC, General Comment 25, para. 21.

230 OAS, ACHR, article 23 (b).

4.7. THE ELECTORAL SYSTEM

International law does not prescribe the electoral system to be used in the conduct of genuine elections. A wide margin of appreciation is granted to the State. However, any electoral system chosen should uphold the right to vote and to be elected by means of universal and equal suffrage in genuine periodic elections that freely express the will of the electors.²³⁷ A principle that could be made explicit in international law is that the electoral system should be established within the legal framework and the means of translating votes into mandates should be clear prior to the election.

Implicit in international law is the understanding that the electoral system should ensure genuine elections such that different political opinions may be represented within the elected body.²³⁸ For example, Chile employs a binomial electoral system that essentially favours the largest minority rather than the majority, resulting in situations in which a group with a smaller percentage of the popular vote captures a disproportionately high number of seats in the legislature. In its concluding observations on the 2007 report of Chile, the HRC states:

While it notes that the reference to the binominal system has been removed from the Constitution, the Committee observes with concern that, as the State party indicated, the electoral system in use in Chile can hamper the effective parliamentary representation of all individuals (articles 3 and 25 of the Covenant). The State party should make greater efforts to overcome the political obstacles to amendment of the Constitutional Act on Popular Votes and Vote Counts, in order to guarantee the right to equal, universal suffrage established under article 25 of the Covenant.²³⁹

Implicit in the understanding to article 25 rights in the context of the electoral system is the need for clear rules regarding the translation of votes into mandates in advance of the election in order to ensure that the rights to vote, to be elected, and to be represented are fulfilled. While it can be argued that failure to have this established in law is likely a violation of article 25, more explicit guidance in this regard would be helpful.

4.7.1. Quotas for Groups Suffering Discrimination

CEDAW, ICERD, and the Convention on the Rights of Persons with Disabilities all include provisions regarding special temporary measures that may be taken in response to discrimination. CEDAW states that special measures may be taken to advance de facto equality for women and men, based on a universal presumption of discrimination against women rooted in ubiquitous cultural norms that place women at a disadvantage. *De jure* equality is insufficient; equality requires greater and longer-term effort on the part of States.

Special temporary measures may be introduced to rectify past discrimination but should be curtailed once the inequality is addressed.²⁴⁰ Special measures to advance the rights of women, minorities, and those with disabilities should not be considered discriminatory.²⁴¹ Specifically, international law recognizes the use of quotas to ensure greater equality for women and that these measures should not be considered discriminatory.²⁴² Presumably this would also be a means of promoting the inclusion of minorities and persons with disabilities, a point that could be clarified in a future General Comment.

4.7.2. Occupational Quotas

International law does not protect occupational groups through the use of quotas. An example of such a quota can be found in Egypt, where at least 50 percent of the seats in the Parliament are reserved for farmers and workers. In practice, this means that “professional” candidates are often subject to discriminatory practice that effectively prevents them from exercising their article 25 right to be elected. “This is most clearly seen in the articles [of the law] which provide that a second placed candidate from the ‘other’ [professional] category would not be elected, even where s/he has secured a majority of the voters—if the first placed candidate was also an ‘other.’”²⁴³ Because farmers and workers are not groups subject to additional protection under international law, these quotas are likely in violation of article 25. Additionally, such quotas may violate provisions of the UDHR regarding freedom from compulsion to join any political organization—in this case, trade unions.

In **conclusion**, while recognizing that electoral systems are required in order to implement the rights to vote and to be elected, international law does not specify which electoral system best protects these and other article 25 rights. While detailed guidance is not provided, one can argue that the margin of appreciation afforded to the State is appropriate in light of the political sovereignty of nations. However, a future General Comment on article 25 could place greater emphasis on:

- The need for clarity in how votes are translated into mandates;
- The implications of different electoral systems on article 25 rights and, correspondingly, issues regarding proportional representation thresholds;
- Special, temporary measures to ensure the representation of women, minorities, and persons with disabilities; and,
- Whether quotas for groups that have not suffered past discrimination are considered discriminatory under international law.

²⁴⁰ ICERD, articles 1 and 2.

²⁴¹ ICERD, article 1; CEDAW, article 4; UN, Convention on the Rights of Persons with Disabilities, article 5 (4).

²⁴² CEDAW Committee, General Recommendation 23, para. 15; HRC, Concluding Observations, Bosnia and Herzegovina (2006), para. 11.

²⁴³ DRI, Egypt’s Electoral Legal Framework Analysis.

²³⁷ HRC, General Comment 25, para. 21.

²³⁸ HRC, General Comment 25, para. 22.

²³⁹ HRC, Concluding Observations, Chile (2007).

4.8. THE LEGAL FRAMEWORK FOR ELECTIONS

Electoral processes should rest on the foundation of a strong legal framework.²⁴⁴ In fact, the HRC states that article 25 rights must be established in law, underscoring the importance of the legal framework in securing the rights to vote, to be elected, and to participate in public affairs. However, there remain some ambiguities regarding the scope and content of international law with regard to the legal framework.

4.8.1. The Legal Framework should Protect Fundamental Rights and Freedoms

That the legal framework for elections should protect fundamental rights and freedoms is established in international law. As outlined in General Comment 25, “elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights.”²⁴⁵ General Comment 25 goes on to state that the means by which citizens participate in public affairs should be established by laws as high as the constitution, as well as other legislation.²⁴⁶ International law also outlines some of the conditions under which article 25 rights may be restricted and states that any such restrictions must be established in the legal framework and should be based on objective and reasonable criteria.²⁴⁷ In order to meet this requirement, laws must be clear and consistent and States must take steps to remove conflicting provisions in the law.

4.8.2. The Stability of the Legal Framework

Largely unaddressed by international law is the need for a stable legal framework in the months immediately preceding an election day. The ECOWAS Protocol on Democracy and Good Governance indicates that there should be no changes made to the election law within the six months prior to elections without the consent of the majority of political actors.²⁴⁸ Such a requirement can serve to promote legal certainty and predictability in the law.²⁴⁹ While there may be circumstances in which the legal framework needs to change within close proximity to election day, a revised General Comment could provide broad guidance on a reasonable timeframe and the circumstances within which changes to the legal framework are generally permissible.

4.8.3. The Electoral Calendar

The requirement to hold genuine elections periodically implies the need for a clear schedule of electoral events. This schedule should allow adequate time for the completion of each element of the electoral process in order to give full effect to electoral

rights, including, for example, adequate time for the review and correction of voter registration information. This promotes certainty regarding the electoral process and the laws that regulate it.²⁵⁰ Overall, international law does not provide clear guidance on the how best to address the challenges of fulfilling human rights within the time constraints posed by electoral events.

4.8.4. The Legal Framework and the Rule of Law

The rule of law is an implicit obligation that is woven throughout all UN instruments. As outlined earlier in this study (Democratic Governance, section 3.8.4), in his 2004 report on the Rule of Law and Transitional Justice, the Secretary General defined the rule of law as

a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.²⁵¹

In the context of the legal framework for elections, this principle requires that:

- The election law be publicly promulgated;
- The election law be fairly applied;
- There is procedural and legal transparency in the electoral legal framework; and,
- All are equal before the law and that laws are equally enforced.

4.8.5. Sanctions and Elections Violations

International law anticipates the need for sanctions and penalties in the case of violations of electoral and other human rights.²⁵² This includes the prevention and investigation of, and punishment and/or redress for, violations of human rights by state and non-state actors.²⁵³ The legal framework for elections should include proportionate and appropriate sanctions for violation of election laws, and these sanctions should be effectively enforced.²⁵⁴

244 HRC, General Comment 25, para. 19.

245 Ibid.

246 HRC, General Comment 25, para. 5.

247 HRC, General Comment 25, paras. 4, 10, and 16.

248 ECOWAS, Protocol on DGG, article 2.

249 OHCHR, Resolution 2005/32, para. 14(b)(v).

250 OHCHR, Resolution 2005/32, para. 14(b)(v).

251 UNSG, *Report on the Rule of Law*, para. 6.

252 ICCPR, article 2 (3); HRC, General Comment 25, para. 11.

253 HRC, General Comment 31, para. 4.

254 The principles established in HRC, General Comment 31, apply to elections.

In **conclusion**, international law generally provides some basic guidance regarding the legal framework for electoral systems. Absent is consideration of the unique time pressures created by the electoral process on the legal framework and dispute resolution mechanisms. Particularly relevant in this regard is the dispute resolution processes that are prompt and efficient, but that allow enough time for the remedy provided to be effective and enforceable. In addition, further guidance regarding stability of the legal framework prior to elections (recognizing that there will be circumstances in which laws do have to change) would be helpful.

4.9. CAMPAIGNING

International law explicitly recognizes the role of campaigning in the electoral process.²⁵⁵ As the HRC states in General Comment 25, “[i]n 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.”

4.9.1. Freedoms of Association and Assembly and Campaigning

Despite the lack of a General Comment on articles 21 and 22 of the ICCPR, the freedoms of association and assembly are clearly established in international law,²⁵⁶ and are essential to the exercise of the right to be elected. Without the effective fulfilment of the freedoms of assembly and association, candidates and parties cannot campaign in the pre-election period. This right should be respected in the context of political rallies and meetings.²⁵⁷

Building on UN norms, the Organization for Security and Cooperation in Europe (OSCE)’s Copenhagen document makes explicit that “freedom of assembly is integral to fostering communication between citizens and political leaders” and so “with regards to the campaign period, political commitments establish that political parties, candidates and citizens have the right to organize and participate in public rallies and conduct legitimate campaigning without undue influence.”²⁵⁸ Like freedom of association, freedom of assembly may be restricted in certain circumstances that are prescribed by law and are necessary in a democratic society. These include national security, public safety, public order, public health or morals or the protection of the rights and freedoms of others.²⁵⁹ In practice, the State has a good deal of discretion with regard to the regulation of the assembly and association rights and can use bureaucratic measures to impede political assembly by citizens.

4.9.2. Campaign Periods

It is common practice among States that there be an official “campaign period,” outside of which campaigning is prohibited. While this is an important means of establishing parameters for campaign finance regulation, international law does not provide guidance on whether this is a permissible restriction on the rights of citizens to participate in the political process; freedom of expression and other rights and freedoms.

4.9.3. Freedom of Expression and Campaigning

Central to the campaign of any candidate or party is the freedom to hold opinions and express them through a variety of media. This freedom is clearly established in law in both the ICCPR,²⁶⁰ and at the regional level in instruments such as the American Convention on Human Rights and the African Union Declaration on Principles of Freedom of Expression.²⁶¹

The free communication of information and ideas between candidates and their supporters is recognized as necessary in international law, as is the need for candidates, parties and their supporters to be able to debate public affairs, criticize and oppose one another, publish political material and advertise political ideas.²⁶² In addition, voters have a right to access information about the candidates for whom they will vote.

The ICCPR is clear that freedom of expression may be limited in circumstances that are prescribed by law and necessary in a democratic society.²⁶³ In addition, the free expression of candidates and their supporters may be limited when those expressions seek to destroy other established rights, would undermine the rights and freedoms of others, or when they are in advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.²⁶⁴

Regional bodies also establish that freedom of expression may be limited in the days immediately preceding the election - a campaign silent period - to protect the free will of the voters.²⁶⁵ The Inter-American Court of Human Rights, in *Ricardo Canese v. Paraguay*, decided that the State must take extra steps to protect freedom of expression in the period prior to elections (Also see section 4.11.4).²⁶⁶

4.9.4. Freedom of Movement and Campaigning

The ability of candidates, political parties and their supports to move freely throughout the country during the campaign period

255 HRC, General Comment 25, para. 25.

256 ICCPR, article 21; OAS, ACHR, article 15; AU, ACHPR, article 11.

257 HRC, General Comment 25, para. 25; IPU, Declaration on Free and Fair Elections, article 4.

258 OSCE, Copenhagen, para. 9.2.

259 ICCPR, article 21.

260 ICCPR, article 19.

261 OAS, AmCHR, article 13.

262 HRC, General Comment 25, para. 25; HRC, General Comment 34, para. 20.

263 ICCPR, 19.

264 ICCPR, article 19(3)(a) and article 20(2).

265 CoE, Recommendation on Measures Concerning Media Coverage During Elections, para. 3.1.

266 *Ricardo Canese v. Paraguay* (08/31/04).

is clearly essential to the enjoyment of article 25 rights. The HRC has recognized this in its concluding observations regarding the 2004 report of Equatorial Guinea in which it stated that “The State party should, in conformity with the provisions of articles 9, 12 and 25 of the Covenant, guarantee the freedom of circulation recognized in article 12 of the Covenant by doing away with all military roadblocks... by repealing the requirement to obtain a visa to leave the country and by abolishing the practice of internal political exile.”²⁶⁷

In **conclusion**, campaigning is recognized as an essential element of the electoral process in international law, and the fundamental rights and freedoms necessary to participate in campaigning are protected. That being said, it would be beneficial for the HRC to issue a General Comment on articles 21 and 22 (on freedom of assembly and association, respectively). In addition, a new or amended General Comment on article 25 could also make more explicit the relationship between freedom of movement (protected by article 12 of the ICCPR) and the enjoyment of article 25 rights, and clarify whether ‘campaign periods’ are permissible under international law.

4.10. PARTY AND CAMPAIGN FINANCE

The United Nations Convention on Corruption requires that States should take steps to ensure transparency in the funding of political campaigns and political parties.²⁶⁸ The HRC goes slightly further to recognize the imposition of spending caps, stating that “reasonable limitations on campaign expenditure may be justified where this is necessary to ensure that the free choice of voters is not undermined or the democratic process distorted by the disproportionate expenditure on behalf of any candidate or party.”²⁶⁹ Interestingly, the HRC considered more detailed guidelines regarding campaign finance when drafting General Comment 25 but ultimately settled on this less controversial formulation.²⁷⁰

Regional instruments, particularly those of the Council of Europe, go further to outline more stringent guidelines for the regulation of campaign finance, such as limitations on anonymous donations, provisions regarding equality in public financing, restrictions on foreign donations, and campaign finance disclosure and reporting requirements.²⁷¹ This level of detail is not reflected at the international level. Discussion regarding campaign finance and its impact on democracy has advanced significantly since General Comment 25 was drafted. A future General Comment could reflect emerging consensus on the need for campaign finance regulation as a means of protecting electoral rights.

4.10.1. Misuse of State Resources

The United Nations Convention Against Corruption (UNCAC), as well as regional anti-corruption instruments, lays the foundation in international law for issues related to the abuse of state resources during an electoral process. In particular, the African Union’s Convention on Corruption defines corruption as the “use of state property for purposes other than those for which they were intended for the benefit of the public official or a third party.”²⁷² In the context of the electoral process, this would prohibit the use of state resources for the benefit of one candidate over another during the election. Greater emphasis could be placed in UN instruments on the undermining effect of the misuse of state resources on the fairness of the electoral process.

In **conclusion**, future interpretation of the both the ICCPR and the UNCAC would be beneficial to the creation of a stronger body of law regarding political parties and campaign finance, as well as the misuse of state resources during electoral periods. Specifically, additional detail regarding the regulation of campaign finance that included information on the following would be helpful:

- Access to information and the need for public disclosure by parties and candidates of campaign contributions (both financial and in-kind);
- The relationship between campaign contribution caps and freedom of expression;
- The role of the State in providing public funds to support campaigns;
- Eligibility to contribute to campaigns (for example, foreign or corporate donations); and,
- Access to, and the misuse of, state resources.

4.11. MEDIA AND ELECTIONS

The role of the media in the electoral process is recognized in international law and has been greatly strengthened by General Comment 34.²⁷³ Not only do media outlets provide candidates a platform to voice their political opinions, they also provide information to voters and can serve as a watchdog for government actions. Achieving these objectives requires that there be a free press and media outlets able to operate without constraint so that they may inform public opinion.

4.11.1. Access to the Media by Candidates

The full enjoyment of article 25 rights requires the unfettered communication of information and ideas about political issues between citizens and candidates.²⁷⁴ Candidates and political

267 HRC, Concluding Observations, Equatorial Guinea (August 13, 2004), CCPR/CO/79/GNQ, para 13.

268 UNCAC, article 7 (3).

269 HRC, General Comment 25, para. 19.

270 HRC, Summary Record CCPR/C/SR. 1493.

271 CoE, Committee of Ministers, Recommendation 2003(4) on Corruption in the Funding of Political Parties.

272 AU, Convention on Corruption, article 4.

273 ICCPR, article 19; HRC, General comment 25, para. 25.

274 HRC, General Comment 25, para. 25.

parties should have freedom to debate public affairs, publish political material, and advertise political ideas.²⁷⁵

The principle of non-discrimination based on political or other affiliation requires that candidates and parties should not suffer discrimination in the granting of access to public media.²⁷⁶ Whether non-discrimination requires strict equality or equity between political candidates is not a clear-cut matter. With regard to public media, many instruments agree that there must be equality between political contestants and that the State should not show a preference for one candidate or party. More specifically on broadcasting time, the HRC noted that opposition parties in Gambia “are routinely disadvantaged and discriminated against in their activities, for example by denial or serious limitation of the possibility of radio or television broadcasts.”²⁷⁷

Regional instruments elaborate that free airtime should be distributed fairly and in a non-discriminatory manner; that any political advertising in public media should be identified as such; and that the costs and conditions involved should be reasonable and equally applied to all candidates and parties.²⁷⁸ This extends to news coverage of the incumbent on public media which should not be abused so that it constitutes additional airtime or print coverage.²⁷⁹ However, the case can also be made that in the context of parliamentary elections equitable distribution for parties based on the scale of their support fulfils article 25.

In the context of private media, the requirement of equality is much less clear and it seems that, according to international law, private media is under no compunction to provide equal access to political contestants.

4.11.2. The Internet and New Media

International law is trying to catch up with advances in new media. While article 19 of the ICCPR protects freedom of expression across different media, until relatively recently, the internet was not explicitly addressed in international law. General Comment 34 recognizes that the internet and mobile communication devices create a “global network for exchanging ideas and opinions that does not necessarily rely on the traditional mass media intermediaries. States parties should take all necessary steps to foster the independence of these new media and to ensure access of individuals thereto.”²⁸⁰

General Comment 34 goes on to state that the “regulatory systems should take into account the differences between the print and broadcast sectors and the internet, while also noting the manner in which various media converge.” In addition, “any restrictions on the operation of websites, blogs or any other internet-based,

electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [that restrictions on article 19 rights must be provided for by law, and necessary for the protection of the rights and reputations of others or for the protection of national security, public order or public health and morals.]”

The impact and challenges of new media specifically in the context of the electoral process remains largely unaddressed. Examples of issues that merit consideration include: whether there is an obligation on the State to ensure that impartial information regarding the election and electoral contestants is available online; the role and regulation of blogs and non-professional, citizen journalism during the electoral period; and the impact of new media on the regulation of campaign finance.

4.11.3. Electoral Information

Citizens have a right to a pluralistic media that allows them access to a variety of viewpoints and media outlets.²⁸¹ In addition to an independent public media service,²⁸² private media can provide voters with a diverse array of viewpoints. Members of linguistic and ethnic minorities should not be denied the benefit of a pluralistic media.²⁸³

The AU Declaration on Freedom of Expression in Africa states that “[t]he public service ambit of public broadcasters should be clearly defined and include an obligation to ensure that the public receive adequate, politically balanced information, particularly during election periods.”²⁸⁴ The same requirement does not necessarily apply to private media outlets, although citizens should have access to information regarding media ownership so that they might be aware of any political biases in their information sources.²⁸⁵ The role and responsibility of the media—both public and private—to provide electoral information could be elaborated in a new or revised General Comment.

4.11.4. Election Quiet Periods

A quiet period before election day, as well as a prohibition on campaigning on election day itself, is a common means of protecting the right of voters to express their will freely at the ballot box. This practice constitutes a permissible restriction of the freedom of expression.²⁸⁶ In *Kim Jong-Cheol v. Republic of Korea*, the complainant—a journalist—published information from opinion polls seven days before the presidential election. He was convicted of violating the Electoral Act, which prohibited

275 HRC, General Comment 25, para. 25.

276 ICCPR, articles 2 and 25; AU, Declaration of Principles Governing Democratic Elections in Africa, article III.a.

277 HRC, Concluding Observations, Gambia (2004), para. 23.

278 CoE, Cttee. of Ministers, Recommendation (99)15, paras. 1.2 and 2.4.

279 UN, Report of the Special Rapporteur on Freedom of Expression (1999), article 17.

280 HRC, General Comment 34, para. 15.

281 HRC, General Comment 34, paras. 13 and 40.

282 HRC, General Comment 34, para. 16.

283 HRC, General Comment 34, para. 15.

284 AU, Declaration on Principles on Freedom of Expression in Africa, article 6.

285 Joint Declaration of the Special Rapporteurs on Freedom of Expression (2007).

286 HRC, General Comment 34, para. 28; CoE, Cttee. of Ministers, Recommendation (99)15, para. 3.1.

publication of opinion polls within 23 days of the election on the grounds that voters needed time for reflection prior to voting. The HRC decided that the restriction on opinion polls in the period immediately prior to election day was a permissible violation of article 19 rights. Because Kim Jong-Cheol only published the information seven days in advance of the election, the HRC did not address whether a 23-day quiet period was unreasonably long. Although practice varies regarding the length of quiet periods, one to three days of silence prior to election day is common; 23 days would appear unduly long.

4.11.5. Defamation during Campaigns:

International law speaks to the issue of defamation. In General Comment 34, the HRC states that the Covenant places a high value on uninhibited debate when it comes to public discussion of public figures, as well as public institutions, such as the military or the head of state, in the political domain.²⁸⁷ This is also reflected in regional sources such as the African Union Principles on Freedom of Expression in Africa, which establishes that the expression of an opinion or a true statement may never constitute a valid claim of defamation.²⁸⁸ Claims of defamation by political figures, should be subject to greater public scrutiny than those made by other citizens.²⁸⁹

In **conclusion**, the role of the media in electoral processes is increasingly well-established in international law (particularly since the release of General Comment 34). However, there remain issues that could be further explored in a new or amended General Comment. These include, but are not limited to:

- The question of equality versus equity vis-à-vis candidates' access to the media;
- The regulation of free airtime for candidates;
- The role and responsibilities of the media to provide neutral electoral information to citizens during the election period;
- The permissible duration of election quiet periods; and,
- The impact and challenges of new media on the electoral process.

Regional instruments, such as the AU Declaration on Principles of Freedom of Expression in Africa and the joint statement of the Special Rapporteurs on Freedom of Expression and Access to Information from the United Nations, the Organization of American States, the Organization for Security and Cooperation in Europe, and the African Commission on Human and Peoples' Rights could serve as a useful reference when considering a new or revised General Comment.²⁹⁰

²⁸⁷ HRC, General Comment 34, para. 38; UN, Report of the Special Rapporteur on Freedom of Expression (1999), article 28.

²⁸⁸ AU, Principles on Freedom of Expression, article 12.

²⁸⁹ Ibid.

²⁹⁰ Joint Statement of the Special Rapporteurs (2009).

4.12. VOTER EDUCATION

Voter education is considered by the HRC to be necessary to ensure that an informed community is able to effectively exercise their right to vote. Electors should be informed of the guarantees of their rights.²⁹¹ This means that voters are aware of the procedures for voter registration, voting, and vote counting; the participants involved in the electoral contest; and the steps they need to take to participate (such as registering to vote). In addition, voters should be made aware of the reasonable limitations that may be placed upon their rights to vote and to be elected.²⁹² In General Comment 25, the HRC also notes that States should take positive measures to overcome specific difficulties, such as illiteracy, so that voters have adequate information on which to base their choice.²⁹³

Election management bodies, as organs of the State, are, under international law, implicitly responsible for ensuring that human rights, including the rights to vote and to be elected, are fulfilled and that citizens are educated about their rights.²⁹⁴ In the context of voter education, this requires that the EMB take responsibility for voter education, an obligation that is reiterated at the regional level in the African Union's Charter on Democracy, Elections and Governance.²⁹⁵ Voter education by the EMB should be impartial so as to ensure that voters are able to freely express their will at the ballot box.²⁹⁶ A new or revised General Comment that explicitly addressed the responsibility of the EMB to provide voter education would be helpful.

4.12.1. Voter Education for Women and Minority Voters

The State should take special measures to pursue voter education campaigns that reach women and minority voters.²⁹⁷ Any special measures likely would not be considered discriminatory because they support the fulfilment of the State's duty to ensure the rights of groups who suffer (or have historically suffered) discrimination.

In **conclusion**, voter education is addressed in international law. However, greater clarity regarding the responsibility of the State to provide voter education would be an important addition to a future General Comment on article 25.

4.13. ELECTION MANAGEMENT BODIES

As discussed above (Democratic Governance, section 3.3), independent institutions play an important role in horizontal accountability. Election management bodies (EMBs) may be one

²⁹¹ ICCPR, article 25 (b); HRC, General Comment 25, paras. 11 and 20.

²⁹² HRC, General Comment 25, para. 11.

²⁹³ HRC, General Comment 25, para. 12.

²⁹⁴ HRC, General Comment 31, paras. 3 and 4.

²⁹⁵ AU, ACDEG, article 12.

²⁹⁶ ICCPR, article 25(b).

²⁹⁷ See for example, ICCPR, articles 2 and 25; CEDAW, articles 3, 4 and 7; ICERD, article 1 (4) and 2 (2).

such independent body and one that, while central to the effective exercise of article 25 rights, is not the focus of great detail in UN documents. The HRC states that “an independent electoral authority should be established to supervise the electoral process, and to ensure that it is conducted fairly, impartially and in accordance with established laws which are compatible with the Covenant.”²⁹⁸ According to the summary record of the HRC in their deliberations regarding General Comment 25, it was widely agreed that such a body was prerequisite for a true democracy.²⁹⁹

While brief, the reference to an independent election authority outlines important principles with regard to election management bodies, specifically the requirement that they be both independent and impartial. While one could argue that independence and impartiality are synonymous, the use of both terms implies that, in fact, election management bodies should be independent from other branches of the government and should also behave impartially, i.e. by treating all contestants equally.

These principles are reiterated at the regional level in Africa in particular, although the impartiality of the institution receives the primary emphasis.³⁰⁰ For example, the African Union’s Declaration on the Principles Governing Democratic Elections in Africa states that “[d]emocratic elections should be conducted... by impartial...electoral institutions.”³⁰¹ Similarly, ECOWAS in its Protocol on Democracy and Good Governance states that the “bodies responsible for organizing the elections shall be independent or neutral and shall have the confidence of all the political actors.”³⁰²

In addition to supervising the electoral process and ensuring that it is conducted fairly, election management bodies—as an organ of the State—are responsible for protecting the human rights of those within their jurisdiction.³⁰³ This requires that the principles of transparency and accountability be upheld.³⁰⁴ However, the EMB does not bear sole responsibility in this regard. Other branches of the government, such as the police and the judiciary, must also ensure that human rights are fulfilled and that remedies are provided when there is a violation of rights.³⁰⁵

4.13.1. The Composition of the Election Management Body

The composition of the election management body falls within the margin of appreciation of the State. However, election management bodies that are not able to function independently and impartially could be in violation of article 25 of the ICCPR—for example, when all members are appointed by one incumbent party or office-holder. In addition, principles enshrined in the United Nations Convention Against Corruption (UNCAC) are applicable with regard to the recruitment of election management bodies, specifically that States must require transparency, efficiency, and equity in the recruitment of officials.³⁰⁶

4.13.2. Election Management Bodies as the Arbiters of Disputes

Election management bodies often play an active role in the resolution of election disputes. As discussed in greater detail in subsection 4.16.2 later in this document, this is likely counter to the right to a fair and public hearing, as established in article 14 of the ICCPR, because a fair and public hearing requires that the case be heard by an independent and impartial tribunal. As established in General Comment 32, a situation in which the executive (in this case the EMB) and the judiciary (in this case also the EMB) are not clearly distinguishable is incompatible with the notion of an independent and impartial tribunal.³⁰⁷

4.13.3. Prevention of Corruption and the EMB

The UNCAC and other regional sources require States to prevent corruption. Transparency is specifically identified as a principal means of combating corruption.³⁰⁸ In the context of the EMB, this includes transparency in public decision-making and procurement.³⁰⁹ UNCAC encourages States to take steps to allow members of the public to obtain information on the functioning and decision-making of the public administration on decisions and acts that concern the public.³¹⁰

4.13.4. Access to Information and the EMB

The EMB, as an organ of the State responsible for the fulfilment of human rights, should adhere to the principles of access to information and transparency established by the HRC in

298 HRC, General Comment 25, para. 20.

299 UN, Summary Record of the 1448th Meeting of the Human Rights Committee, para. 90 CCPR/C/SR.1448.

300 “Establish and strengthen independent and impartial national electoral bodies responsible for the management of elections. Where necessary, appropriate national consultations shall be organized to determine the nature and the structure of the bodies.” AU, ACDEG, article 17(1); “Establish impartial, all-inclusive, competent and accountable national electoral bodies staffed by qualified personnel, as well as competent legal entities including effective constitutional courts to arbitrate in the event of disputes arising from the conduct of elections.” SADC, Principles and Guidelines Governing Democratic Elections, para. 7.3.

301 AU, Declaration on the Principles Governing Democratic Elections in Africa, article II(4c).

302 ECOWAS, Protocol on Democracy and Good Governance, article 3.

303 HRC, General Comment 31, para. 4.

304 See Democratic Governance section 3.3 above.

305 HRC, General Comment 31.

306 UNCAC, article 18; Also, see AU, Convention Against Corruption, article 7.

307 HRC, General Comment 32, para. 19.

308 Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as: (a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes.” UNCAC, article 13 (a); “The State Parties to this Convention undertake to abide by the following principles: 3. Transparency and accountability in the management of public affairs.” AU, African Union Convention on Preventing and Combating Corruption, article 3(3).

309 UN, UNCAC, article 13.

310 UNCAC, article 10 (a).

General Comment 34. Specifically, EMBs, as organs of the State, should “proactively put in the public domain government information of public interest. States parties should make every effort to ensure easy, prompt, effective and practical access to such information.”³¹¹ In the context of the electoral process, information regarding voter registration, candidate registration, election results, key decisions of the EMB regarding the electoral process, etc., are all information of public interest. Given the time constraints posed by election timetables, EMBs have a special responsibility to provide information in a timely fashion. While implicit in international law, this could be made more explicit in a new or amended General Comment.

4.13.5. The EMB and Taking Necessary Steps

Article 25 (b) rights may be undermined by the actions (or inaction) of the EMB that, while without malicious intent, may de facto disenfranchise voters and weaken confidence in the electoral process. International law requires that States take the steps necessary to give effect to human rights. In the context of the EMB, this requires that States put in place a plan to ensure the effective implementation of procedures that facilitate the exercise of article 25 rights.

In **conclusion**, a new or revised General Comment on article 25 rights should address the following in more detail:

- The role and responsibilities of EMBs, specifically with regard to the independence of the election management body from other branches of government (including financial independence);
- The responsibilities of EMBs in the administration of elections and the fulfilment of rights in relation to other state institutions;
- Ensuring that the EMB is efficient and effective in its work; and,
- That the EMB is transparent in their functioning and adheres to international good practice³¹² with regard to access to information and publicly accessible decision-making processes.

4.14. VOTING AND ELECTION DAY PROCESSES

Article 25 of the ICCPR states that citizens not only have the right but should also have the “opportunity” to vote and to be elected in genuine, periodic elections. Despite this very clear provision, international law is largely silent with regard to explicit discussion of how article 25 rights to vote and to be elected should unfold on election day. This is likely due to the fact that election day

processes are specific to the country in question, and that they are highly procedural. However, election day procedures can have a huge impact on the participatory rights of citizens. A number of critical issues that are implicitly addressed by international law are outlined briefly below.

4.14.1. Voting Hours and the Right to Vote:

In order to facilitate the right to vote, polls should be open for some time outside of standard work hours.³¹³ Additionally, late opening and early closing of polling stations that prevents voters from casting their ballot impedes the right to vote established in article 25. Provision should be made to ensure that migrant workers can cast their ballots. Finally, it is common practice that voters who arrive at a polling station prior to the official closing time, but are still in line to vote as the polls close, be allowed to vote and exercise their franchise.

4.14.2. Accessibility of Polling Stations

Polling stations should be accessible to voters so that they may exercise their article 25 right to vote.³¹⁴ In order to exercise this right without undue burden, there is an implicit understanding that the number of polling stations should be appropriate to the number of electors so that they may vote without long delay, and polling stations should be located—and voters assigned to them—such that voters do not have to travel long distances to vote. Polling stations should also be accessible to disabled voters.³¹⁵ In addition, States should consider ways to guarantee the political participation of citizens who may have been displaced in the period prior to election day, or who are perhaps out of the country.

4.14.3. Provision of Voting Facilities

There are a number of ways in which the State can take positive measures to ensure the right to vote by the broadest number of voters.³¹⁶ Such measures include the introduction of out-of-country or absentee voting³¹⁷ and the provision of voting facilities for prisoners remanded in custody or those in hospitals. The introduction of electronic voting technologies can also be one means of facilitating voting by persons with disabilities, in addition to the use of special ballot papers (that utilize Braille for example).

4.14.4. Electronic Voting Technologies

Electronic voting technologies have the potential to increase the efficiency and efficacy of election administration and thereby

³¹¹ HRC, General Comment 34, para. 19.

³¹² Good practice, or “best practices,” are “are non-binding techniques and practices widely recognized as the most effective means of implementing credible, democratic electoral processes and meeting [public international law] obligations. In some cases there may be multiple ‘best practice’ ways for a state to meet its obligations.” Davis-Roberts and Carroll, “Using International Law,” 430.

³¹³ ICCPR, article 25 (b).

³¹⁴ ICCPR, article 25; HRC, General Comment 25, para. 12.

³¹⁵ UN, Convention on the Rights of Persons with Disabilities, article 29.

³¹⁶ ICCPR, articles 2 and 25.

³¹⁷ HRC, General Comment 25, para. 20.

assist in the fulfilment of article 25 rights. For example, electronic voting technologies can increase the speed of results aggregation, reduce human error in the tabulation of votes, and provide increased access to the voting process for disabled voters.

However electronic voting technologies also have the potential to undermine article 25 rights. For example, the ability of voters to freely express their will can be undermined when voting via the internet; the polling station, as a controlled environment under the oversight of poll workers, provides a level of security and protection from intimidation that is absent when voters cast their ballots at home on their computer. The free expression of the will of the people also may be undermined when electronic systems do not include a paper ballot and/or the election system does not provide for audits to compare the electronic results captured by the machine to a manual count of a sample of paper ballots. Without such a safeguard, scrutiny of the system is largely impossible and it is difficult to verify that the results as represented by the machine reflect the actual choices of the voters.

The impact of electronic voting on article 25 rights is not explicitly addressed in law emanating from the United Nations. At the regional level, the Committee of Ministers of the Council of Europe has issued two detailed recommendations on the certification and use of electronic voting technologies. These recommendations provide a good deal of detail regarding electronic voting and could serve as a reference for other international bodies considering the impact of technology on voting rights. Overall, while it can be said that the use of electronic voting technologies must continue to uphold the rights established in article 25, more explicit guidance on this issue in future General Comments would be beneficial.

4.14.5. Ballot Papers and Ballot Boxes

States should also take measures to provide the materials necessary for the election to take place. Inadequate voting supplies effectively undermine the right to vote. This has been recognized by the HRC in their Concluding Observations on the 2008 Macedonian report:

The Committee notes with concern alleged irregularities during the local elections in 2005, including the inadequate supply of ballot papers to some minority groups...the State party should take measures to ensure that future elections are conducted in a manner fully guaranteeing the free expression of the will of the electors³¹⁸

International law recognizes the need for election information, materials, and ballots that are available to all citizens. Specifically, the HRC states that “information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.”³¹⁹ This can also be understood to mean that information and election material should be understandable by all citizens

318 April 17, 2008 [CCPR/C/92], para. 18.

319 HRC, General Comment 25, para. 12.

who wish to cast their ballots.

International law establishes that the “security of ballot boxes must be guaranteed.”³²⁰ This requires that the State take steps to ensure that the ballot boxes remain free from interference during election day and that election materials are likewise protected in the period immediately following the election. Procedural steps often taken to address this issue include the use of numbered, tamper-evident seals on the ballot boxes, independent verification of the voting and counting process by candidates’ agents and observers, and other safeguards designed to prevent unauthorized interference with election materials and technologies.

4.14.6. Women’s Participation

Women should enjoy equal rights to men, including equality in the right to vote.³²¹ This may necessitate special measures to ensure that women can participate in public affairs, such as rules and regulations that allow children to accompany their parents in the polling stations and allowances for pregnant women to move to the front of queues.

4.14.7. Voter Identification

In many countries voters are required to provide some form of identification prior to receiving their ballot. The request for voter identification may constitute a reasonable restriction on the right to vote, protecting equal suffrage and the principles of “one person, one vote.”³²² The State should, however, take the steps necessary to proactively provide voters with any identification required (at no cost to the voter) so that they may be able to vote freely.³²³ This could include measures such as door to door voter registration and identification processes or the provision of free identification cards. Voter identification procedures that create a barrier to participation are counter to article 25 obligations to ensure universal suffrage and the right to vote.

4.14.8. Prevention of Multiple Voting and Election Day Fraud

Equal suffrage requires that the principle of “one person, one vote” be respected.³²⁴ In the context of election day, this can mean that safeguards should be in place to prevent multiple voting (i.e., the inking of voters’ fingers—a common practice in many parts of the world) and other forms of election fraud, as well as ensuring ballot security and reconciliation.

320 HRC, General Comment 25, para. 20.

321 ICCPR, article 2; UN, CEDAW, article 4.

322 HRC, General Comment 25, para. 21.

323 ICCPR, article 2.

324 HRC, General Comment 25, para. 21.

4.14.9. Freedom of Choice and Security of the Person

International law establishes that everyone is entitled to security of the person, including during the election period.³²⁵ This may require that on polling day security personnel be present, but they should not interfere in the voting process. In addition, States must also protect the rights of voters to cast their ballot free from coercion and intimidation by third parties and non-state actors.

4.14.10. Election Day Complaints

The right to an effective remedy for the violation of rights is established in international law.³²⁶ In the context of the election day process, voters, candidates, and other citizens should have access to an effective remedy for violations of their rights. Because of the time-bound nature of the right to vote and to be elected on election day, any remedy provided should not only be effective but also expeditious, so that article 25 rights are not undermined by electoral procedure. This should be addressed more explicitly in a future General Comment.

In **conclusion**, the impact of election day procedures on article 25 participatory rights is inadequately addressed in international law. Greater attention should be paid in international law to the details of election day proceedings and the impact of administrative procedures, like those outlined above, on the enjoyment of fundamental rights and freedoms.

4.15 COUNTING AND TABULATION OF THE VOTES

Accurate and honest counting of votes is a critical means of ensuring not only that the will of the people is actually expressed via the ballot box but also that the right to be elected is upheld.³²⁷ However, international law does not provide a great deal of guidance on the interaction between the counting process and fundamental rights. Similar to the preceding section on voting and election day, this section outlines some issues that are essential to the fulfilment of article 25 (b) rights but are only implicitly addressed in international law.

4.15.1. Determining Voter Intent

The determination of voter intent—i.e. who the voter intended to vote for in cases where it is not clear—is a critical issue in the counting of ballots and establishing the will of the people.³²⁸ However, this is frequently a process that, while often outlined in law, occurs at the polling station level and can be the subject of poll worker discretion. International law has yet to address this issue.³²⁹

4.15.2. Accuracy of the Count

The free expression of the will of the voter, as well as the right to be elected, requires that the vote counting process be honest and accurate. Treaty level sources, and interpretations of them, to date have not explicitly addressed this; however, it is implicit in an election process that is representative of the will of the voters. The OSCE's Copenhagen Document could serve as a useful guide here. Paragraph 7.4 reads:

[Participating States agree to...] ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public.

4.15.3. Publication of Detailed Results

Access to information regarding the counting process and elections results is an essential means of ensuring the will of the people is reflected in the results of the election.³³⁰ As outlined above, access to information is an increasingly well-established norm in international law. In General Comment 34, the HRC states that freedom of expression (and access to information) are a necessary condition for the realization of the principles of transparency and accountability that are essential for the promotion of human rights, including participatory rights.³³¹

In the context of elections and their results, the State should proactively put in the public domain information regarding the election and provide clear procedures regarding access to that information in a timely fashion.³³² The nature of election results as a matter of public interest, and the time-bound nature of the election, requires that results be disaggregated to the polling station level immediately after the close of polls so that the accuracy of the count can be verified at later stages of tabulation.

4.15.4. Right to an Effective Remedy and Judicial Review of the Counting Process

International law states that there should be “access to judicial review (or other equivalent process) of the voting and counting so that electors have confidence in the security of the ballot and the counting of the votes.”³³³ This requires that the results of elections should be verifiable and the votes securely preserved for later review. The right to challenge election results should be provided by law.

In **conclusion**, a new or revised General Comment on article 25 should consider two critical issues with regard to vote counting: (1) a requirement of accuracy and honesty in the vote count so that the will of the people might be established; and, (2) an

325 ICCPR, articles 9 and 25.

326 UN, ICCPR, article 2(3).

327 ICCPR, article 25(b).

328 ICCPR, article 25.

329 *Barrionuevo and Bernabe v. Spain* [CCPR/C/D/1794/2008] would have addressed these issues; however, the HRC determined the complaint to be inadmissible.

330 ICCPR, article 19(2); ICCPR, article 25 (b).

331 HRC, General Comment 34, para. 3.

332 HRC, General Comment 34, para. 19.

333 HRC, General Comment 25, para. 20.

explicit reference to access to information in the context of the vote counting process and results tabulation, including the need to post detailed polling station level results immediately after the polls close.

4.16. ELECTORAL DISPUTE RESOLUTION

The timely and effective resolution of disputes is essential for an election to be considered genuine. In all elections, inevitably administrative problems and the violation of the rights to vote and to be elected (as well as violations of other non-participatory rights) will occur. As a result, a timely and effective means of addressing these issues should be in place.

Although the resolution of disputes is often the focus of the post-election day period, citizens should have access to meaningful dispute resolution throughout the electoral period. This includes the ability to challenge decisions of the EMB in a court of law and resolution not only for administrative problems but also for violations of a citizen's fundamental rights.

Electoral dispute resolution therefore brings to bear a number of issues related to the right to an effective remedy, the right to a fair and impartial hearing, access to information, and the duty of the State to take the steps necessary to give effect to fundamental rights that are outlined in the democratic governance section. In addition, a number of specific issues outlined below are pertinent.

4.16.1. Voters, Candidates, Parties, and NGOs and Dispute Resolution

Voters, and candidates and parties—as well as civil society to some extent—as representatives of citizens, are always the most important participants in the electoral process. With regard to the resolution of electoral disputes, a critical issue for these groups is that of *locus standi*—who has the ability to bring an action before the court. The ICCPR establishes that individuals should have standing for violations of their rights (both state-based and international); however, practice varies among States. The HRC could further elucidate that standing, which is established in international law and should be reflected in domestic law.

4.16.2. Election Management Bodies as Arbiters of Disputes

Election Management Bodies are responsible for the administration of the election but also may have an additional role as arbiter of election disputes. This practice is widely accepted in many regions and has its strengths given that EMBs may be more familiar with the electoral code and the procedural details of election administration than a judicial body.³³⁴

However, one could argue that an EMB can never be qualified to make binding decisions regarding the determination of rights because it may not satisfy the criteria for independent tribunals laid out in General Comment 32, which notes that:

- EMB members who may adjudicate complaints are not always subject to the hiring processes articulated as necessary to ensure independence.³³⁵
- It is unclear whether an EMB would be considered independent given that they administer the elections (thereby fulfilling an executive function) and these roles may not be distinguishable, and could, in fact, constitute a conflict of interest.³³⁶
- An EMB that administers an election and then adjudicates disputes related to the administration of that election may not appear impartial to a reasonable observer.³³⁷
- Due to their principal role as organizer and administrator of the election, EMBs often lack the time or capacity to hear a potentially large number of cases, meaning they may not be—in practical terms—in a position to offer an effective remedy.

Although there may be instances in which an EMB is able to meet the criteria outlined in General Comment 32, in the majority of cases this is unlikely. If an EMB does meet the criteria to qualify as a “competent, independent and impartial tribunal” under article 14 of the ICCPR, then obligations related to a right fair and impartial hearing would apply to them. If, on the other hand, the EMB does not meet those criteria, a complainant must have recourse to a tribunal that does meet such criteria at least at one point during the election proceedings.³³⁸

4.16.3. The Role of the Judiciary in Dispute Resolution

The judiciary clearly plays an important role in the adjudication of electoral disputes. General Comment 25 stipulates that “there should be...access to judicial review or other equivalent process that electors have confidence in the security of the ballot and the counting of the votes.”³³⁹ The judiciary should be independent and impartial—General Comment 32 provides guidance in this regard. However, more explicit reference to the role of the judiciary in addressing electoral complaints throughout the election process would be helpful, specifically whether, given General Comment 32, resolution of disputes by the EMB is permissible under international law as an “equivalent process.”³⁴⁰

In **conclusion**, while addressed in international law, greater detail on critical issues regarding electoral dispute resolution would be helpful. Specifically, a new or revised General Comment could address:

³³⁵ HRC General Comment 32, para. 19; OHCHR, *Basic Principles on the Independence of the Judiciary*, principle 10-13; Council of Europe, *Handbook on the Right to a Fair Trial*, 30-31.

³³⁶ HRC General Comment 32, para. 19.

³³⁷ HRC General Comment 32, para. 21.

³³⁸ HRC General Comment 32, para. 15; Venice Commission, *Code of Good Practice*, para. 93.

³³⁹ HRC, General Comment 25, para. 20.

³⁴⁰ OHCHR, “Basic Principles for the Independence of the Judiciary.”

³³⁴ Venice Commission, *Code of Good Practice*, para. 93.

- The standing of key stakeholders to bring election related complaints;
- The timeline for dispute resolution processes that de facto ensures that citizens are granted effective and expeditious remedies within the time constraints imposed by the election process;
- Whether EMBs meet the criteria of a tribunal or if their decisions must always be subject to judicial review (per General Comment 32); and,
- The role of the judiciary in the election dispute resolution process.

4.17. OBSERVATION OF ELECTIONS

Independent scrutiny of an election (particularly independent, non-partisan verification by domestic and international observers) can be an important means of promoting the transparency of and confidence in the electoral process. As the HRC states in General Comment 25, “[t]here should be independent scrutiny of the voting and counting process and access to judicial review or other equivalent process so that electors have confidence in the security of the ballot and the counting of the votes.”³⁴¹ However, international law does not define “independent scrutiny” nor provide a great deal of specific guidance regarding the rights, roles, and responsibilities of domestic or international observers in the electoral process. Candidates and their agents, as citizens and electoral stakeholders, have a more clearly defined mandate, as outlined below.

4.17.1. Domestic Observers

As citizens, domestic observers have a right to participate in the public affairs of their countries.³⁴² This includes through membership of non-governmental organizations that focus on election related issues.³⁴³ As outlined in General Comment 25, States should take all steps necessary to ensure the fulfilment of article 25 rights, including the right to participate in public affairs. Any restrictions on this right, as with the rights to vote and to be elected, should be established by law, be proportional, and should only be restricted on the basis of objective and reasonable criteria.³⁴⁴ As outlined above (Democratic Governance section 3.8.2), the HRC has established that NGOs are essential for the protection of human rights and that they should not be subjected to onerous registration procedures nor their members to harassment and intimidation.

341 HRC, General Comment 25, para. 20; see also “The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place.” OSCE, Copenhagen Document, para. 8.

342 ICCPR, article 25.

343 “Citizens also take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves. This participation is supported by ensuring freedom of expression, assembly and association.” HRC, General Comment 25, para. 8.

344 HRC, General Comment 25, para. 4.

At the regional level, the ACDEG states that “State Parties shall create a conducive environment for independent and impartial national monitoring or observation mechanisms.”³⁴⁵ The OSCE’s Copenhagen document, although a political commitment, also includes some provision for domestic (as well as international) observers:

The participating States consider that the presence of observers, both foreign and domestic, can enhance the electoral process for States in which elections are taking place. They therefore invite observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law. They will also endeavour to facilitate similar access for election proceedings held below the national level. Such observers will undertake not to interfere in the electoral proceedings.³⁴⁶

Beyond the obligations that are pertinent to civil society most broadly, and the provisions outlined above, international law does not adequately address the value and special needs of domestic observer groups, specifically the requirements of timely accreditation and access to the process free from unreasonable technical barriers.

4.17.2. International Observers

International election observation has become a widespread practice in the last 25 years. Despite this development, there remains relatively little reference to international observation in international law. By far the most detailed document regarding international observation is the Declaration of Principles for International Election Observation, a document endorsed by the secretariat of the United Nations and in the 2009 General Assembly Resolution on *Strengthening the Role of the UN in Enhancing Periodic and Genuine Elections and the Promotion of Democracy*.³⁴⁷

There is no explicit requirement that States must invite international observers to assess their elections. However, at the regional level, there is a strong basis to argue that international observation is emerging as an obligation within international customary law. For example, some intergovernmental organizations have mandates that require member States, on the basis of political commitments, to permit international observers to observe their elections. An example is the OSCE. While States are not obligated to issue invitations to the African Union, the AU Department of Election Assistance has a mandate to observe elections in every member state.

As non-citizens, international observers do not have the same rights as domestic observers, whose ability to scrutinize the electoral process is based on their article 25 rights. Rather, the

345 AU, ACDEG, article 22

346 OSCE, Copenhagen Document, para. 8

347 Declaration of Principles for International Election Observation; (UNGA Resolution A/C.3/64/L.26/Rev.1).

rights and responsibilities of international observers are based on mutual agreement with the government of the host country, through a letter of invitation or a memorandum of understanding.

4.17.3. Candidates and their Agents

The HRC states that the voting and counting process should be subject to independent scrutiny and specifies that ballots should be counted in the presence of candidates and their agents.³⁴⁸ The presence of multiple candidate or party agents at a polling station can serve as an important transparency measure and a means of protecting the right to be elected. A future General Comment could clarify that this access should extend to all aspects of the electoral process.

4.17.4. Access to the Process and to Information

All observers, non-partisan or otherwise, require access to all aspects of the electoral process, as well as to the information and data of the election in order to verify its implementation and the accuracy of election results. Because of the time-sensitive nature of an electoral process, it is essential that access to the process and to information about it be granted in a timely fashion—it would, for example, be counter-productive to grant access to information regarding voter registration months after election day when it is of limited use to voters or candidates.

In the context of electoral verification there are two immediate information needs: timely access to the decision-making process of the election management bodies and other authorities and access to documentation, such as polling station tallies. This right of access to information, both documented information and otherwise, is an important means of supporting the transparency of the electoral process and the work of non-partisan and partisan observers as agents of that transparency. For example, in the context of the vote counting process, observers and candidate/party agents should have access to the results of the election at the polling station level in order to verify that vote counting is accurate at later stages of tabulation.

In **conclusion**, election scrutiny is partially established in international law. However, an amended General Comment on article 25 could place greater emphasis on the rights of non-partisan, citizen observers to participate in the electoral process. In addition, greater definition of what is meant by “independent scrutiny,”³⁴⁹ including who can and should provide such scrutiny, and the roles and responsibilities of the scrutinizer, would be beneficial.

³⁴⁸ HRC, General Comment 25, para. 20.

³⁴⁹ HRC, General Comment 25, para. 20.

TABLE OF RECOMMENDATIONS – DEMOCRATIC GOVERNANCE


Key:

Largely covered by international obligations: ●

Partially covered by international obligations: ●




Not or inadequately covered by international obligations: ●

Issue	Status	Content / Citation	Recommendation
SEPARATION OF POWERS			
The term “separation of powers” is not explicitly used in international human rights instruments; however, the HRC has recognized the principle on various occasions.			
Relationship between the executive and the legislature	●	<p>International law prohibits an overconcentration of powers in the executive (ICCPR articles 19, 25). According to the HRC, cases of inadmissible over-concentration of powers include:</p> <ul style="list-style-type: none"> • Unaccountable decision-making; • Legislative powers of unelected institutions or unfettered executive powers of unelected bodies; and, • Powers of government bodies to issue laws, decrees, and decisions without being subject to independent review. 	The principle of no-overconcentration of powers in the hand of the executive seems largely unknown and should be subject to awareness activities. A new General Comment 25 could make this principle explicit and could elaborate on the principle in light of its decisions.
MINIMUM RIGHTS OF PARLIAMENT			
Meaningful parliaments are a necessary precondition to render citizens' right of political participation and suffrage effective, as granted by article 25 of the ICCPR. For this reason a number of minimum rights derive from article 25. These minimum rights include—to differing extents—the right to supervise the executive, the right to legislate, the right to procedural autonomy, the right to adopt the State budget, and the immunities of parliamentarians.			
Supervision of the executive	●	No explicit right to supervise the executive exists in international law but it derives from article 25 of the ICCPR: summon government, conduct hearings, access to information or criticize government in public.	Stakeholders should raise awareness for the implicit rights to Parliament. A new General Comment 25 should elaborate on identified minimum parliamentary rights in more detail.
Right to legislate	●	No explicit right to legislate exists in international law but it derives from article 25 of the ICCPR. Article 25 of the ICCPR forbids the full delegation of legislative powers to government.	
Procedural autonomy	●	No explicit procedural autonomy exists in international law but derives from article 25 of the ICCPR.	
Budget autonomy	●	International law contains no explicit guarantee of Parliament's autonomy. However, the right to adopt national budgets is a key aspect of independent parliaments. It is incompatible with article 25 if Parliament cannot survey and adopt significant parts of the national budget.	

Issue	Status	Content / Citation	Recommendation
Immunities of Parliamentarians		International law is silent on parliamentary immunities. Parliamentary immunities can only be derived from article 25 of the ICCPR to a very limited extent in as far as they are vital for ensuring the functioning of parliament.	


INDEPENDENCE OF THE JUDICIARY

Under international law, the relationship between the judiciary and the executive is largely determined by article 14 of the ICCPR and similar provisions of regional human right treaties. Article 14 guarantees the right to a “fair and public trial by a competent, independent and impartial tribunal established by law.”

Tenure and dismissal of judges		International law forbids insecure tenure or the dismissal of judges without reasoning in law (ICCPR article 14).	The legal framework set by international law is adequate in principle.
Interference		International law forbids the ending of or interference in proceedings by executive.	
Validity of court decisions		Non-judicial bodies may not adjudicate. Court decisions are binding and may not be changed by other branches of government.	



CONSTITUTION-MAKING


According to article 25 of the ICCPR, citizens must have an effective opportunity to take part in the conduct of public affairs, which includes constitution-making processes.

Process		According to the HRC, constitution-making processes should be transparent and inclusive. Other issues, such as broad based consensus on a constitution or qualified majority for adoption, are not part of international law. International law contains neither an obligation for States to put a constitution to a referendum nor a subjective right to demand direct participation through referenda or plebiscite.	New General Comment 25 should make explicit that constitution-making processes must be transparent and inclusive.
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STATE OF EMERGENCY


During a state of emergency democratic governance is diminished. The ICCPR and other international treaties provide a number of detailed procedural and substantive legal rules on the state of emergency.

Process		A state of emergency must be officially declared by constitutionally competent body.	Legal framework regulating a state of emergency is detailed and comprehensive but would benefit from clearer language on the rights of Parliament during a state of emergency. Revised General Comments could clarify Parliament’s rights. Relevant OSCE commitments could inform the revision of General Comment 29.
Requirements		A state of emergency may only be declared in extreme times that threaten the life of the nation and its existence. It may not be inconsistent with international law and may not involve discrimination solely on the ground of race, colour, sex, language, religion, or social origin.	

Issue	Status	Content / Citation	Recommendation
Duration and scope		Emergency measures must be limited to the extent strictly required by the exigencies of the situation and meet proportionality tests. The ICCPR regulates only to a limited extent the dissolution of Parliament during a state of emergency; it should prohibit dissolution of parliament, at least in general terms. General Comment 29 contains no geographic limitations or accountability requirements, unlike the OSCE, which adopted more detailed commitments on the state of emergency.	



CIVILIAN CONTROL OF ARMED FORCES

Implicitly deriving from article 25 of the ICCPR and principle of separation of powers, the security sector—as part of the executive—must be supervised and controlled by elected authorities.

Civilian supervision		The HRC has developed the requirement of “full and effective” civilian control over the military. To ensure full and effective civilian supervision, the mandate, composition, command, and number of the armed forces must be clearly defined in law.	There is only limited case law and no explicit mention of civilian supervision in relevant ICCPR case law. It would be beneficial if a revised General Comment 25 could strengthen civilian supervision. The principles of separation of power and no-overconcentration of powers in the hand of the executive could serve as key benchmarks for elaborating on civilian supervision (see above).
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TRANSPARENCY





The principle of transparency, i.e. the right of access to government proceedings and information as well as information disseminated by public authorities, is enshrined in several international treaties.

Access to information		The right to access to information held by public bodies is enshrined in article 19 (2) of the ICCPR and further specified by HRC decisions.	With the new General Comment 34, the legal framework on transparency has become more detailed and comprehensive but it would still benefit from clearer guidance on refusing access to information.
Refusal of access		Public authorities should circumscribe access to information narrowly but the ICCPR contains no details on legitimate grounds to refuse information. General Comment 34 only requires States to substantiate “any refusal to provide access to information.”	The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters could inform the debate.

POLITICAL PARTIES



Article 22 of the ICCPR guarantees the right to freedom of association, which includes the right to establish and operate political parties. According to article 22, freedom of association may only be restricted by law and 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.” Articles 20 of the UDHR, 11 of the ECHR, 10 of the ACHR, and 16 of the ACHR also guarantee freedom of association. Treaty bodies have specified detailed requirements on registration, operation, and banning of political parties.

Registration		Key aspects of political party registration are implicitly regulated by international law, including requirements for a registration framework in law and a prohibition on excessively restrictive registration processes and requirements.	International law provides only a broad framework for political party registration, merely forbidding excessive restrictions on registration. Although international law is unlikely to regulate the details of registration, the existing framework would
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Issue	Status	Content / Citation	Recommendation
		HRC decisions have developed criteria for party registration only in general terms.	benefit from more detailed and illustrative interpretation of articles 22 and 25, either through a revised General Comment or detailed decisions under the first protocol.
Discrimination and harassment		The ICCPR requires State parties to treat political parties on equal footing, for example concerning access to media, and forbids harassment of political parties through, for example, detentions, fines, or travel restrictions.	The legal framework to prevent discrimination and harassment of political parties is adequate in principle.
Multiparty system		Today it is largely uncontested that the ICCPR forbids one-party systems and requires State parties to allow multiparty pluralism.	The framework on party-pluralism as developed by the HRC and other bodies constitute an adequate basis.
Ban of political parties		International law sets only general and vague requirements, such as proportionality, in regards to the banning of political parties.	New General Comments on articles 21 and 22 could specify the requirements regarding the banning of political parties and issues of internal party democracy.
Inner party democracy		Article 25 of the ICCPR requires State parties to ensure internal party democracy in general terms.	




CIVIL SOCIETY ORGANIZATIONS

Article 22 of the ICCPR protects the right of association, which includes the rights of citizens to register and operate civil society organisations (CSOs). Treaty bodies have specified in general terms requirements on registration and operation of CSOs.

Registration		The HRC has criticized onerous registration requirements for NGOs in addition to cases of intimidation. There are no HRC decisions on NGO cooperation with foreign partner organizations, or on abusive taxing—another practically relevant issue.	There is no General Comment on article 22, the ICCPR provision on the freedom of association, which explains to some extent why international law governing CSOs is limited. A General Comment on article 22 could address this gap.
Operations			

MEDIA

Article 19 (2) of the ICCPR protects the freedom of media, one of the cornerstones of a democratic society. The HRC has reinforced the freedom of media and press in numerous cases and, most recently, in General Comment 34.

Licensing and accreditation		With a new General Comment on article 19 and extensive case law, the scope and content of the freedom of media is well established and elaborated in significant detail.	Protection of the freedom of media is well established.
Independent and unrestricted media			
Overconcentration of media			

RIGHT OF SELF-DETERMINATION

Article 1 of the ICCPR protects in general terms internal political self-determination.
















Internal political self-determination		Article 1 of the ICCPR guarantees broad autonomy within a State and participation of people in the State's political decision-making process. Article 1 makes no reference to democracy but is based on elements of democracy.	As relevant HRC jurisprudence is thin, a revised General Comment should be considered. A new General Comment should state that article 1 must be interpreted in conjunction with the political rights under the ICCPR.
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TABLE OF RECOMMENDATIONS - DEMOCRATIC ELECTIONS

Issue	Status	Content / Citation	Recommendation
GENUINE ELECTIONS THAT GUARANTEE THE FREE EXPRESSION OF THE VOTERS			
Genuine elections that guarantee the free expression of the will of the voters are addressed in international law, specifically in UN, ICCPR article 25 (b).			
Definition of "genuine elections"		While genuine elections are required in international law, there remains a lack of clarity regarding the definition of the term "genuine election."	<p>A new or revised General Comment on article 25 could include:</p> <ul style="list-style-type: none"> • Greater clarity regarding the definition of the term "genuine election;" and, • Clarity regarding whether the will of the people requires that the candidates/s with the most votes win.
PERIODIC ELECTIONS			
Periodic elections are addressed in international law emanating from the United Nations as well as regional bodies such as the Organization of American States and the African Union.			
Interval between elections		<p>International law states that elections should be held periodically and that the interval between elections should not be unduly long (General Comment 25).</p> <p>There is little guidance regarding the circumstances under which it is permissible for elections to be postponed or cancelled.</p>	<p>A new or revised General Comment on article 25 could provide greater clarity on:</p> <ul style="list-style-type: none"> • The permissible interval between elections; • The circumstances under which is permissible to postpone elections; and, • The circumstances under which elections should not be held.
SECURITY OF THE BALLOT			
The secrecy of the ballot is well established in international law (UN, ICCPR article 25 (b)).			
Secret ballot		<p>The need for secrecy of the ballot is well established in international law.</p> <p>International law provides little guidance, however, regarding possible measures that can be taken to guarantee the secrecy of the ballot, or the potential impact and challenges of new election technologies on the enjoyment of this right.</p>	<p>A new or revised General Comment on article 25 could include:</p> <ul style="list-style-type: none"> • Greater detail regarding the measures States may take to protect secrecy of the ballot; and, • The impact of new election technologies on the enjoyment of secrecy of the ballot and other fundamental rights and freedoms.




Issue	Status	Content / Citation	Recommendation
THE RIGHT TO VOTE AND TO BE ELECTED			
The rights to vote and to be elected are protected by United Nations treaties such as the ICCPR, as well as regional treaties such as the African Charter on Human and Peoples' Rights, the American Convention on Human Rights, and the Arab Charter on Human Rights.			
The right to vote and to be elected		The right to vote and to be elected is included in the ICCPR, as well as regional treaties. Additionally, reasonable and unreasonable restrictions are addressed in some detail in the ICCPR.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> • The rights and status of individuals with double citizenship; • The rights of long-term residents to participate in public affairs;
Citizenship		<p>Citizenship has historically been left to the discretion of States. However, this is slowly changing.</p> <p>Citizens should enjoy electoral rights regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, or sexual orientation (UN, ICCPR articles 2 and 25).</p> <p>Long-term residents may enjoy rights to vote and to be elected, but this is left to the discretion of the State (HRC, General Comment 25, para. 3).</p> <p>Internally Displaced People should be granted full electoral rights (UN Guiding Principles on Internal Displacement, para. 22 (d); AU Convention for Internally Displaced People, article 9).</p> <p>The voting rights of refugees and asylum seekers to vote in their country of origin are unclear.</p>	<ul style="list-style-type: none"> • The rights of citizens outside of the boundaries of their country (including refugees and asylum seekers) to vote and to be elected; • The rights of military personal to vote and to be elected; • The impact of residency on the enjoyment of the rights to vote and to be elected; • Compulsory voting; • The impact of voter registration procedures on the enjoyment of article 25 rights; and, • The rights of independent candidates to contest elections.
Restrictions on the rights to vote and to be elected		International law indicates what constitutes a reasonable or unreasonable restriction on the rights to vote and to be elected (HRC, General Comment 25, para. 15).	
Compulsory voting		Compulsory voting is not addressed in international law.	
Voter registration		<p>Voter registration is recognized in international law as a means of ensuring the right to vote (HRC, General comment 25).</p> <p>International law only implicitly addresses the impact of voter registration procedures on the enjoyment of article 25 rights.</p>	
Independent candidacy		The requirement that no one be compelled to join a political association may require that independent candidacy be permitted. However, regional jurisprudence from the Americas conflicts with this (HRC, General Comment 25, para. 17; UDHR, article 20 (2)).	

Issue	Status	Content / Citation	Recommendation
EQUAL SUFFRAGE			
Equal suffrage is protected by international law and is critical to the voting process, as well as to boundary delimitation processes (UN, ICCPR article 25(b)).			
Boundary delimitation		Equal suffrage lies at the heart of the boundary delimitation process. However, international law is unclear regarding the degree of deviation between districts that is permissible. While not explicitly addressed in international law, there are a number of means by which States can implement impartial boundary delimitation.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> • The impact of the process of boundary delimitation on the exercise of electoral rights; • Reasonable and unreasonable deviations from equality between districts; • The frequency with which boundaries should be delimited; and, • The nature of the body responsible for boundary delimitation (e.g. whether it should be independent from other branches of government).
ELECTORAL SYSTEM			
International law recognizes the need for an electoral system. All electoral systems are permissible as long as they uphold international rights (HRC, General Comment 25, para. 21).			
Electoral system		Greater clarity could be provided on key issues such as quotas and the requirement of transparency in the means of converting votes into mandates.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> • Transparency in the method for converting votes into mandates; and, • The use of quotas.
LEGAL FRAMEWORK FOR ELECTIONS			
International law recognizes the need for a legal framework for the electoral process (HRC, General Comment 25, para. 19).			
Stability of the legal framework		International law does not explicitly address the need for a stable election law in the months prior to the election (Exception: ECOWAS, Protocol on Democracy and Good Governance, article 2).	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> • The stability of the election law (recognizing that there may be circumstances in which changes close to election day are necessary); and, • The impact of the electoral calendar on the enjoyment of fundamental rights and freedoms (and vice versa), for example the need for clear and predictable timelines for voter registration, dispute resolution etc.
Electoral calendar		Elections occasionally place an extraordinary time constraint on processes that are essential to the fulfilment of rights—for example, voter registration or electoral dispute resolution processes. At other times, there may be too much time allowed for aspects of the process—for example, protracted election dispute processes. International law does not address the need for a clear electoral calendar that allows adequate time for all elements of the process.	
Sanctions		International law recognizes the need for sanctions and penalties in the case of violations of electoral and other human rights. In addition, broader principles established in General Comment 31 regarding the need for sanctions to be proportionate, appropriate, and enforceable also apply in the context of elections.	

Issue	Status	Content / Citation	Recommendation
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CAMPAIGNING

Campaigning is recognized as a critical component of a genuine election. Campaigning as part of a genuine election process requires that a number of related rights and freedoms be enjoyed, for example the freedoms of expression, association, assembly, and movement (UN, ICCPR articles 12, 19, 21 and 22).

Freedom of assembly and association		The freedom of assembly and association is addressed in international law. In addition, the role of these freedoms on the electoral process is addressed.	A General Comment on articles 21 and 22 of the ICCPR would be useful.
Campaign periods		Official campaign periods are a common practice. However, it remains unclear whether the benefits of such a campaign period (i.e. for the regulation of campaign finance) outweigh the potential restrictions on rights and freedoms.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> • Whether official campaign periods are a permissible restriction of rights; and, • The clear link between freedom of movement and the enjoyment of article 25 rights.
Freedom of movement		Freedom of movement is guaranteed by article 12 of the ICCPR. However, the enjoyment of article 25 rights is dependent on the fulfilment of this freedom.	


PARTY AND CAMPAIGN FINANCE

International law only briefly references the role of party and campaign finance in the electoral process (UN, CAC, article 7 (3); HRC, General Comment 25, para. 19).

Party and campaign finance		International law inadequately addresses party and campaign finance.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> • Access to information and the need for regular, public disclosure of campaign contributions; • The relationship between campaign contribution caps and freedom of expression; • The role of the State in providing public funds to support campaigns; • Eligibility to contribute to campaigns (for example, foreign or corporate donations); and, • Access to state resources and prevention of their misuse.
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THE MEDIA AND ELECTIONS

The role of a pluralistic and diverse media in promoting genuine elections is recognized in international law. Particularly relevant is freedom of expression, protected in article 19 of the ICCPR and enshrined in regional treaties.

Election quiet periods		Election quiet periods are permissible in international law; however, there remains a lack of clarity about their duration (HRC, <i>Kim Jong-Cheol v Republic of Korea</i>).	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> • The question of equality versus equity vis-a-vis candidates' access to the media; • The regulation of free airtime for candidates; • Ensuring that citizens receive politically neutral information during an election;
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Issue	Status	Content / Citation	Recommendation
Access to the media by candidates	●	International law partially addresses access to the media by candidates; however, it remains unclear whether that access should be equal or equitable (HRC, General Comment 25, para 25; AU Declaration of Principles Governing Democratic Elections in Africa, article III a).	<ul style="list-style-type: none"> The responsibilities of the media to provide electoral information to citizens; The permissible duration of election quiet periods; and, The impact and challenges of new media on the electoral process.
The internet and new media	●	International law is beginning to address the changes brought by the internet and new media. However, this has yet to be addressed explicitly in the context of the electoral process.	
Responsibilities of the media during elections	●	International law could be strengthened regarding the role of the media during the electoral process, specifically the responsibility of the media to provide information regarding electoral processes.	

VOTER EDUCATION

International law recognises that voter education is necessary to ensure the enjoyment of electoral rights by an informed electorate (HRC, General Comment 25, para. 11).


Voter education	●	Voter education is recognized in international law as an important part of the electoral process (HRC, General Comment 25). However, there remains a lack of clarity regarding the role of the Election Management Bodies (EMB) in providing voter education	<p>A new or revised General Comment on article 25 could provide clarity regarding:</p> <ul style="list-style-type: none"> Whether the EMB should bear primary responsibility for ensuring that electors are informed of their rights.
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ELECTION MANAGEMENT BODIES

International law states that an independent electoral authority should be established to supervise electoral processes (HRC, General Comment 25, para. 20).




The EMB as independent and impartial bodies	●	In reference to the need for an independent electoral authority, greater definition regarding the term “independent” would be helpful, e.g. whether independence requires complete independence from other branches of government.	<p>A new or revised General Comment on article 25 could provide clarity regarding:</p> <ul style="list-style-type: none"> The definition of “independent” in the context of the EMB; The role and responsibilities of the EMB, particularly vis-à-vis other organs of the State and specifically with regard to the independence of the EMB from other branches of government (including financial independence); The responsibilities of the EMB in the administration of elections and the fulfilment of rights; and, The need for transparency and accountability in the functioning of the EMB.
Composition of the EMB	●	International law does not address the composition of the EMB or the appointment of EMB members.	
The EMB and necessary steps	●	International law does not explicitly address the need for an election management body to take all steps necessary in order to ensure the enjoyment of article 25 rights.	

Issue	Status	Content / Citation	Recommendation
VOTING AND ELECTION DAY PROCESSES			
Voting and election day processes are not well addressed in international law.			
Voting procedures	●	International law is largely silent on the issue of voting procedures. This is likely in large part due to the variety of practice among States. However, election day procedures greatly impact the enjoyment of electoral rights.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> Necessary steps to ensure that the right to vote and to be elected can be effectively enjoyed, such as ensuring polling stations are open beyond regular working hours; the provision of enough, conveniently located voting facilities; procedures that ensure women and those with disabilities are able to vote; and, The impact of electronic voting technologies on the enjoyment of article 25 rights.
VOTE COUNTING AND TABULATION			
International law does not address vote counting and tabulation processes in great detail.			
Vote counting procedures	●	International law does not address vote counting procedures in any detail, most likely because they vary widely across countries.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> A requirement of accuracy and honesty in the vote count so that the will of the people might be established; and, An explicit reference to access to information in the context of the vote counting process and results tabulation, including the need to post detailed polling station level results immediately after the polls and to publish all detailed and aggregated results promptly.
Accuracy of the count	●	The need for an honest and accurate count of the election results is only implicitly addressed in international law in that elections should reflect the will of the people.	
Publication of detailed results	●	International law does not explicitly require that polling station level election results be publicly posted. Rather, a case can be made that access to information, coupled with the rights to vote, to be elected, and to participate in public affairs, creates an obligation on the State to provide such information.	
ELECTORAL DISPUTE RESOLUTION			
Dispute resolution processes are well established in international law through the rights to an effective remedy and the right to a fair and impartial hearing (UN, ICCPR articles 2 and 14).			
Locus standi in election disputes	●	International law does not explicitly address the need for citizens to have standing before a tribunal for violations of electoral rights.	A new or revised General Comment on article 25 could provide clarity regarding: <ul style="list-style-type: none"> The standing of key stakeholders to bring election related complaints; The timeline for dispute resolution processes that de facto ensures that citizens are granted effective and expeditious remedies within the time constraints imposed by the election process;
Election management bodies as arbiters of disputes	●	International law provides fairly detailed general guidance on fair and impartial hearings. When applied to elections, however, international law is not explicit regarding whether these principles mean that EMBs should not serve as arbiters of election disputes (a common practice) because this may constitute a conflict of interest.	

Issue	Status	Content / Citation	Recommendation
The role of the judiciary in electoral disputes		The role of an independent judiciary in the resolution of electoral disputes is implicitly addressed in international law.	<ul style="list-style-type: none"> Whether election management bodies meet the criteria of a tribunal or if their decisions must always be subject to judicial appeal (per General Comment 32); and, The role of the judiciary in the election dispute resolution process.

OBSERVATION OF ELECTIONS

Observation of elections is broadly established in international law through the right to participate in public affairs, the right to be elected, and the concept that a genuine election guarantees the free expression of the will of the voters (UN, ICCPR article 25).

Domestic observation		Citizens have the right to participate in the public affairs of their country, including through civil society organizations. However, international law does not address the value and special needs of domestic observer groups.	<p>A new or revised General Comment on article 25 could provide clarity regarding:</p> <ul style="list-style-type: none"> The definition of “independent scrutiny” in General Comment 25; The rights and responsibilities of domestic, non-partisan election observers; The ability of candidates and their agents to observe all aspects of the electoral process; and, The role and responsibilities of international observers.
Candidate and party observation		The rights of candidates, parties, and their representatives or agents to have access to the count is well established in international law.	<ul style="list-style-type: none"> The role and responsibilities of international observers.
International observation		International observers do not have the same rights under international law as citizens of the country. Despite this, invitation of international observers is now common practice and an emerging international norm.	

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