INTERNATIONAL ELECTION MONITORING

BY

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> « I'm the Supreme Dictator of all, and I'm elected once a year. This is a democracy, you know, where people are allowed to vote for their rulers. A good many others would like to be Supreme Dictator, but as I made a law that I am always to count the votes myself, I am always elected.»
> GLINDA OF OZ

1. Civil and political rights received first attention in the process of establishing human rights obligations through international instruments : although social and economic rights are as basic to mankind, they remain illusory if the former are undermined. The right to participate in the conduct of public affairs is no longer regarded as a sufficient guarantee against a tyranny but remains a primary control : the heart of a free government are free elections. States have bound themselves through several international documents to guarantee the fundamental idea that a citizen is only free if he is actively associated in the establishment of the legal order to which he is a subject.

2. Characteristicly, this right requires active State involvement. Unlike the other « First Generation » rights and freedoms, participation holds a positive entitlement (1). Extent and content of this right has been refined over the years through the conventions and their interpretation which will be reviewed in this article.

3. The establishment of fundamental rights elicits the question to its implementation. In case of denial of political participation to the population, several forms of action may come to mind. Other States can bring the question before the General Assembly or the Security Council of the United Nations for discussion or proper action. States, however, are both violator and guarantor of human righs and additional enforcement mechanisms are required (2). The conventions may establish their own supervisory procedure. Unfortunately, not all individuals have effective recourse to this implementation mechanism. A final proceeding aimed at ensuring implementation of this international obligation and observance of the standards which they provide is the monitoring of elections by international observers. This article wants to contribute with a review of their status and of the standards to guide such observers in the assessment of the electoral process. Thus, in covering the subject, we deal in interdependent parts both with procedural (election monitoring) and substantive (standards) safeguards to protect the right to political participation.

STATE SOVEREIGNTY AND THE FUNDAMENTAL RIGHT TO POLITICAL PARTICIPATION

4. The right to political participation has been acknowledged as a fundamental right in the Universal Declaration of Human Rights (3). It has been specified further in the International Covenant on Civil and Political Rights thus explicitly engaging the State party thereto (4).

(1) « (...) the primary obligation in the field concerned is not one of abstention or non-interference, as with the majority of the civil or political rights, but one of adoption by the State of positive measures to 'hold' democratic elections », Mathieu-Mohin and Clerfayt judgment of 2 March 1987, *Publ. Eur. Court H. R.*, Series A, vol. 113, p. 22, § 50.

(2) TOMUSCHAT, C., « Human Rights in a World-Wide Framework — some current issues », 45 *ZaöRV* 561 (1985).

(3) Adopted 10 December 1948 by the General Assembly of the United Nations (U.N. Doc. A/811). The vote was 48-0-8.

Article 21 : [1] Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

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

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

(4) Adopted as Resolution 2200 (XXI) by the General Assembly of the United Nations in 1966 and entered into force on 23 March 1976 (U.N. Doc. A/6316). 81 ratifications as of 1 January 1986.

5. The right is equally protected in regional instruments of the American, European and African continents: the American Declaration on the Rights and Duties of Man (5) and the American Convention on Human Rights (6), the European Convention on Human Rights (7) and especially the First Protocol thereto (8) and the African Charter on Human and People's Rights (9). The international and regional actions regarding the

Article 25. Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions:

(a) To take part in the conduct of public affairs, directly or through freely chosen representatives;

(b) To vote and to be elected at genuine periodic elections which shall be 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.

(5) Adopted by the Ninth Conference of American States in Bogotà some months before the United Nations adopted the Universal Declaration in 1948 (OEA/Ser.L/V/I.4 Rev. [1965]).

Article XX. Every person having legal capacity is entitled to participate in the government of his country, directly of through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.

Article XXXII. It is the duty of every person to vote in the popular elections of the country of which he is a national, when he is legally capable of doing so.

Article XXXIV. It is the duty of every able-bodied person [...] to hold any public office to which he may be elected by popular vote in the State of which he is a national.

Article XXXVIII. It is the duty of every person to refrain from taking part in political activities that, according to law, are reserved exclusively to the citizens of the state in which he is an alien.

(6) Signed 22 November 1969 and entered into force 18 July 1978 (OEA/Ser.L/V/II.23 Doc.rev. 2). Ratifications as of 1.1.1986: 19.

Article 23. Right to Participate in Government.

1. Every citizen shall enjoy the following rights and opportunities:

a. to take part in the conduct of public affairs, directly or through freely chosen representatives;

b. to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and

c. to have access, under general conditions of equality, to the public service of his country.

2. The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings.

(7) Signed on 4 November 1950 and entered into force on 3 September 1953 (European Treaty Series, nº 5). 21 countries have ratified the Convention as of 1.1.1986.

Article 16. Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

(8) Signed 20 March 1952 and entered into force 18 May 1954 (European Treaty Series, nº 9). As of 1 January 1986, there are 18 ratifications.

Article 3. The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

(9) Adopted 26 June 1981 and ratified by 30 countries as of 8.10.1986, the Charter has entered into force 21 October 1986 (OAU Doc. CAB/LEG/67/3/Rev.5).

Article 13. (1) Every citizen shall have the right to freely participate in the government of his country, either directly or through chosen representatives in accordance with the provisions of the law.

[2] Every citizen shall have the right of equal access to the public service of his country.

Article 27. [1] Every individual shall have duties towards [...] society, the State and other legally recognized communities and the international community.

Article 29. The individual shall also have the duty:

[...] [2] To serve his national community by placing his physical and intellectual abilities at its service; [...]

[4] To preserve and strenghten social and national solidarity, [...].

prohibition of all forms of discrimination produced additional sources. Equal enjoyment of political rights for women is guaranteed in the Convention on Political Rights of Women (10), the Convention on the Elimination of all Forms of Discrimination against Women (11) and the Inter-American Convention on the Granting of Political Rights to Women (12). Racial discrimination is prohibited, *inter alia* with regard to political rights, in the Convention on the Elimination of All Forms of Racial Discrimination (13).

6. The participation of the people in their government is conditional to the right of self-determination of the people and the right to choose their own political, social and economical system and a guarantee to the protection of all other fundamental rights and freedoms (14). It is preservative of all other rights and forms the condition itself *sine qua* no implementation of the other human rights obligations should be expected. We have indeed gathered evidence from all traditional sources of international law (15) to show that the right to political participation is part of that legally binding core of human rights which merits and indeed does receive international concern and action.

(10) Adopted as a resolution by the U.N. General Assembly in 1952 and entered into force 7 July 1954. 91 ratifications as of 1.1.1986.

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

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

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

(11) Adopted by the General Assembly on 18 December 1979 and entered into force 3 September 1981 (UN Doc.A/Res./34/180 [1980]). 85 ratifications.

Article 7. States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right :

(a) To vote in all elections and public referends 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 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.

(12) Signed 2 May 1948 entered into force 22 April 1949. 21 ratifications as of 1.1.1986.

Article 1. The High Contracting Parties agree that the right to vote and to be elected to national office shall not be denied or abridged by reason of sex.

(13) Signed 7 March 1966, entered into force 4 January 1969. Ratifications as of 1.1.1986 : 124.

Article 5. In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights : [...]

(c) Political rights, in particular the rights 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.

(14) Apparently, a people cannot choose to give up its freedom of choice, since the right is « inalienable » and the choice of a fascist system would not be tolerated (see arts. 106-107 of the U.N. Charter).

(15) Cf. art. 38 Statute of the International Court of Justice.

7. The United Nations Organization engaged in actions for the implementation of political rights on several occasions, thus revealing international concern with the nature of a political regime (16) :

— The first case arose out of the request of Poland in April, 1946 that the Security Council would declare the Franco regime in Spain a threat to the peace, because of its system of government. Although the resolution was not carried, the right to take cognizance of this question was never challenged. And later in the General Assembly, a recommendation was adopted that Spain should be debarred from membership in international agencies since the « Franco fascist government of Spain (...) does not represent the Spanish people » and that Ambassadors of the Member States should immediately be recalled from Madrid (17).

— Another occasion occurred in March 1948 at the request of Chile, in reference to the events that surrounded the coup in Czechoslovakia (February 22, 1948), which was said to deny the participation of the population in the government. Such proposals were vetoed by the Soviet government.

— A draft resolution which criticized the armed intervention in Czechoslovakia (1968) as a violation of the Charter and the principle of self-determination was again vetoed by the U.S.S.R.

— The General Assembly adopted resolutions calling for interpretation of Chapter XI of the Charter to develop representation of the people living in the non-self-governing territories.

— The actions of the United Nations in relation with the elections in South Korea (18) were actions to restore the political rights to the Korean people. The Organization equally supervised, observed or even authenticated elections in other countries as we shall see.

— In 1956 - 1958 the General Assembly for a time withheld recognition of the credentials of the Hungarian representatives on the ground that the Khadar government did not represent the Hungarian people, and passed several resolutions affirming the right of the Hungarian people to choose its own government, and urging for free elections under United Nations auspices (19).

(16) See LAUTERPACHT, H., *International Law and Human Rights*, Archon Books, Hamden, 1968, 175 (hereinafter cited as *International Law and Human Rights* ; LUARD, E. (ed.), *The International Protection of Human Rights*, Praeger, New York, 1967, 134-140 and RAJAN, M. S., *The expanding jurisdiction of the United Nations*, N. M. Tripati Private Ltd, Bombay, 1982, 12-30.

(17) *GA Journal*, nº 75, 825-826. Rajan infered from this « that both in theory and in practice, there are no matters which, by their very nature, and under all circumstances, necessarily fall within the domestic jurisdiction and matters of international concern are quite mutuable, depending on the circumstances of each concrete case, and irrespective of the general rule which governs the scope of the two jurisdictions » RAJAN, M. S., *o.c.*, 13.

(18) See par. 56.

(19) The new Hungarian government refused access to U.N. observers into the country. The Special Committee on Hungary had to collect information and hear witnesses outside the country.

— The United Nations set out a commission in 1961 to investigate whether genuine, free and secret elections were possible in Germany. The commission was not able to enter the German Democratic Republic.

— The situation in Cyprus resulted in the creation of a peace-keeping force and the appointment of a U.N. Mediator. The Security Council and the General Assembly frequently discussed their reports in which constitutional changes, the Cypriotic legislation, especially electoral laws, and the results of elections were an issue.

— In the early '70s, the General Assembly more or less symbolicly withheld approval of the credentials of the South African delegation on the ground that, 80 % of the South African people being disenfranchised, the South African government did not represent the people. When these General Assembly resolutions were followed in 1974 with a rejection of the credentials by the Credentials Committee and the South African delegation was refused to participate in the work the President ruled that the South African delegation was consequently excluded from the General Assembly.

The U.N. concern is not restricted to questions of self-determination or to colonial situations. These examples establish that the right to political participation is an area that is not essentially covered by domestic jurisdiction.

SCOPE OF THE RIGHT TO POLITICAL PARTICIPATION

8. Decisions of the United Nations Human Rights Committee and of the judicial apparatus on the regional level clarify the scope of the right to political participation. Especially the decisions of the latter prove that the right being upheld is not only very comprehensible but also has a degree of specifity and universality permitting enforcement.

The remarkable correspondence in the interpretation of the texts guides us with persuasive authority as to the just interpretation of the following « distinct but connected » (20) rights.

The right to a democratic government

9. The general economy of the phraseology « representatives », « freely chosen », « opinion » or « will » of the « people », « voters », « electors », expressed in elections « periodic » or « at reasonable intervals », « free », « honest », « genuine », « popular », by « secret ballot » or « equivalent free voting procedures » and « universal and equal suffrage » points to the idea of democracy even though this word is not used in any of the instruments.

(20) SIEGHART, P., *The International Law of Human Rights*, Clarendon Press, Oxford, 1983, 362.

The International Covenant on Civil and Political Rights (Civil Covenant) guarantees only « particular forms and formal institutions which are common to a variety of political systems but which do not play the same roles in the different systems » (21). Therefore, every system that allows the citizens to participate in political life by means of elections which enable them to choose periodically their own representatives may call itself a democratic government under the provisions of the Universal Declaration on Human Rights and the Civil Covenant, even though our opinions of « direct », « representative », « popular », « Western », « parliamentary » or « socialist » democracy may differ. The importance of the term in the Civil Covenant lies rather in the negative in that no system which debars its citizens from taking part in the process of decisionmaking can be deemed democratic. Whatever its guise, a real democracy exists only in those systems where respect for human rights and fundamental freedoms are existing norms and values (22).

10. The most important purpose of article 3 of the first Protocol to the European Convention (hereafter the First Protocol) on the other hand is to protect an « effective political democracy » in all European Contracting States « which are likeminded and have a common heritage of political traditions, ideals, freedom and the rule of law » as the Preamble to the Convention reads. This requires a democratic society with a real choice between parties and candidates. Illustrative is the Greek case where the Commission reported that article 3 of the First Protocol « presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society » (23), thus establishing the connection between those elections and the constitution of the legislature (24). But even within this scope, a number of variants of the democratic system of government exists and are fully compatible with the requirement of article 3 of the First Protocol (25).

11. One of the guiding principles upon which the Charter of the Organization of American States is based is also the effective exercise of representative democracy as the basis of the political organization of Member States (26). The Interamerican Commission on Human Rights (hereafter

(21) PARTSCH, K. J., « Freedom of conscience and expression, and political freedoms », in *The International Bill of Rights*, Henkin, L. (ed.), Columbia University Press, New York, 1981, 241-242, giving as example « universal and equal suffrage ».

(22) DAES, E.-I. A., *The Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under art.* 29 *of the Universal Declaration of Human Rights*, United Nations, New York, 1983, 127-128 ; KHUSHALANI, Y., « Human Rights in Asia and Africa », 4 *H.R.L.J.*, 418 (1983).

(23) The Greek Case, *Yearbook XII* (1969), 179.

(24) JACOBS, F. G., *The European Convention on Human Rights*, Clarendon Press, Oxford, 1975, 178 ; VAN DIJK, P. and VAN HOOF, G. J. H., *Theory and Practice of the European Convention on Human Rights*, Kluwer, Deventer, 1982, 355-356.

(25) CASTBERG, F., *The European Convention on Human Rights*, Sythoff, Leiden, 1974, 181.

(26) *Article* 3 (d) « The solidarity of American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy ».

Interamerican Commission) applies this principle in its investigations on human rights violations and maintains that a democratic regime in which the exercise of power derives from the free popular expression must remain the framework of any system of government whatever alternative forms constitutional law may recognize (27).

The right to take part in the government

12. The right to take part in the government (28) leaves open the form (choice of direct or representative participation) and the extent of participation. Direct elections are not required. The right to participate bears only on the legislative organs and does not confer a right to elect the judiciary or the executive branch of the government or its administrative officials or to decide by referendum. The provision of the Civil Covenant refers only to « those organs of government which are normally elected in democratic states, particularly the legislature » (29). However, in a republican system where the presidential function would be one of these organs « normally elected », the institution of a President-for-life would be incompatible with the right to participate (30). Article 25(b) of the Civil Covenant would also apply to regional and local elections (31).

13. The narrower undertaking in the European Convention to hold free elections is explicitly confined to the choice of the legislature (« *corps législatif* ») only (32). Once that legislature has been constituted, and will be checked at regular intervals through new elections, the requirements of article 3 of the First Protocol have been satisfied. This provision does not require that the people be further consulted by referendum about certain legislative acts (33). The European Commission on Human Rights (hereafter the European Commission) has further taken the position that the national legislature was meant by the drafters (34) and that article 3 of the First Protocol does not apply to local or municipal government (35). The constitutional law of the Member State is decisive (36) as to whether other

(27) See for example, *Report on Suriname* (1983), OAS/Ser.L/II.61/Doc. 6 rev.1, 13-20, 23, 41-44 (hereinafter cited as *Suriname Report* [1983]).

(28) The term is « to take part in the conduct of public affairs » in article 25 (a) of the Civil Covenant and article 23 (1) of the American Convention.

(29) *Report of the Committee of Experts*, CE/H/70/7 § 218 (1970).

(30) See the Interamerican Commission's *Fourth Report on the Situation in Haïti* (1979), OEA/Ser./L/V/II.46, doc. 66 at 69 ; United Nations Human Rights Committee, Mpaka-Nsusu v. Zaire (157/1983), 7 *H.R.L.J.* (1986), 280-281.

(31) PARTSCH, K. J., *o.c.*, 242.

(32) Mathieu-Mohin and Clerfayt judgment, *o.c.*, § 53.

(33) E.g., the conclusion of a treaty, 6742/74 (F.R.G.), *DR* 3 (1976), 103 ; and a referendum on E.E.C. membership was not an election for the choice of a legislature, it was of consultative character and the organization of it was not obligatory, 7096/75 (U.K.), *DR* 3 (1976), 166.

(34) 8364/78 (Lindsay et al. v. U.K.), *DR* 15 (1979), 250.

(35) 10650/83 (Clerfayt and Legros v. Belgium), May 17, 1985, to be published in DR 42. Confirmed in 11377/85, 11391/85, 11414/85 (U.K.), July 1985.

(36) The term legislature must be interpreted in the light of the institutions established by the constitution of the Contracting Parties, 6745 en 6746/74 (*Belgium*), *DR* 2 (1975), 115. The

legislative bodies besides the national parliament within the constituent states of a federation or of regions with extensive self-government fall within the ambit of article 3 of the First Protocol. The European Commission considered that the local government of Northern Ireland does not fall within the scope of the article, noting that insofar these authorities have a legislative function it is confined to the making of by-laws « and those powers are rigidly limited by statute and they have no power to make rules other than in accordance with the powers conferred by Parliament » (37). But the Commission applied article 3 of the First Protocol to a regional parliament with final legislative authority in Austria (38). Similarly, the former regional councils of Belgium which could only propose bills but not enact them, did not belong to the « legislature » (39). The 1980 constitutional reforms have vested these councils with certain decretal powers having force of law. This redistribution of legislative power has brought the Councils within the meaning of the legislature as described by art. 3 of the First Protocol (40). This article equally extends to the German *Länder* (41) and would extend to the Swiss *cantons* (42).

14. Developments in the structure of the European Communities may make it even necessary to guarantee the rights protected in the First Protocol in respect of the European Parliament or other bodies assuming at least in part the functions of a legislature. The Parliament as it functions now however has only certain supervisory and budgetary powers and is only an advisory organ as to legislation (43).

15. Hereditary heads of State may exercise legislative power, provided they do it jointly with another legislative body and do not have the power to take such measures by decree (44). As to the consistency of an institution where membership is hereditary or by appointment like the British House of

word « legislature » does not necesarily mean only the national parliament, however ; it has to be interpreted in the light of the constitutional structure of the State in question, Mathieu-Mohin and Clerfayt judgment, *o.c.*, § 53.

(37) 5155/71 (U.K.), *DR* 6 (1977), 13.

(38) 7008/15 (Austria), *DR* 6 (1977), 120-121.

(39) 6745 and 6746/74, *o.c.*, 118.

(40) 9267/81 (Moureaux v. Belgium), *DR* 33 (1983), 128, confirmed by the European Court in the Mathieu-Mohin and Clerfayt judgment, *o.c.*, § 53.

(41) Implicit in 2728/66 (F.R.G.), *Yearbook X* (1967), 340. The European Commission did not distinguish between Federal and Land elections.

(42) This explains the problems for the Swiss Confederation with regard to the ratification of the First Protocol. In certain cantons women are still denied the franchise for local elections (contrary to the prohibition of sex-based discrimination) and in some other cantons the vote is still taken by way of direct democracy and « counting of hands » (which runs foul with the secrecy of the ballot). Reservations would counter these difficulties if the Confederation were to ratify the Protocol (88 *Rev. Gén. D.I.P.* (1984), 964-965). See also SCHWEIZER, R. J., « Zur Stellung der Schweiz gegenüber Art. 3 des Zusatzprotokolls », XXXIII *Schweizerisches Jahrbuch für Internationales Recht* 37 (1977).

(43) 8364/78, *o.c.*, 251 ; 8612/79 (Alliance des Belges de la Communauté Européenne v. Belgium), *DR* 15 (1979), 263.

(44) VAN DIJK, P. and VAN HOOF, G. J. H., *o.c.*, 1982, 361.

Lords with article 26 of the Civil Covenant, the Human Rights Committee had to satisfy itself with the British reply that the peers have no vote in the election of the Commons and that hereditary membership in the House of Lords « is not seen necessarily as an advantage » (45). A complaint under the European Convention against the special allegedly discriminatory rule that Belgian princes of royal blood in line to the throne automatically become senator at the age of 18 was ill-founded in the eyes of the European Commission : the special treatment was a tradition of the constitutional monarchy in Belgium, in which context the Convention was prepared. Another consequence of the Belgian system which explained the distinction was the fact that those princes in their quality may be called upon to hold high office (46).

16. If wide areas of government are occupied by the military and elected officials may be removed by the executive, the right to participate is seriously limited (47).

17. A prohibition « for a term of 15 years from engaging in any of the activities of a political nature authorized by the Constitution of the Republic, including the vote » (48) must always be specifically justified (49) and is in any case an unreasonable restriction on the right to political participation when it seeks to sanction specific political opinions (50).

18. It is generally aecepted as customary law that the right to political participation may be enjoyed fully only by citizens of the country and that nothing prohibits a State not to confer any political rights to aliens (51).

The right to vote

19. The right to participate in the conduct of public affairs focuses mainly on the guarantee of free elections : elections should be held, and they should be without coercion or pressure.

20. The Civil Covenant provides that the right to vote is an individual

(45) UNDoc CCPR/C/1/Add 35 § 2 (1978).

(46) 6745 and 6746/74 (Belgium), *o.c.*, 117.

(47) Interamerican Commission, *Annual Report* 1979/80, OEA/Ser.L/V/II.50, doc. 13 at 123-124.

(48) Article 1 of the Acta Institucional nº 4, September 1, 1976 of Uruguay, cited in footnote by the UNHRCee, Massera v. Uruguay (R115), A/34/50 at 128.

(49) UNHRCee, Pietrarcia v. Uruguay (R10/44), A/36/40 at 153. If such justification were to be sought in the existence of an emergency situation thereby invoking art. 4 (1) CCPR, the respondent Government is duty-bound to give a sufficiently detailed account of the relevant facts. Landinelli Silva and others v. Uruguay (R8/34), 2 *H.R.L.J.* (1981), 132.

(50) UNHRCee, Massera v. Uruguay (R115), *o.c.*, 129 ; Weinberger Weisz v. Uruguay, (R7/28), 1 *H.R.L.J.* (1980), 243.

(51) This restriction is explicit in some instruments (African Charter, American Convention, Civil Covenant), implicit in other (American Declaration : « everyone ... government of *his* country ») and some provide the possibility of restrictions based on nationality : American Declaration XXXVIII, European Convention 16 and American Convention 23(2).

right subject to reasonable restrictions only and, referring to art. 2 of the Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

21. Article 3 of the First Protocol is stated only as an undertaking. Where the European Commission was at first restrictive holding that an individual right to vote was not guaranteed by the First Protocol (52), its interpretation evolved. A later decision (53) recognized the principle of universal suffrage but added that it did not necessarily follow that everyone was guaranteed the right to participate in elections without restriction. On further consideration the Commission eventually revised its earlier interpretations and concluded that article 3 of the First Protocol guarantees, in principle, the right to vote (and to stand for election) : « For it follows (...) of the whole Convention » (54). The European Court, in the sole case brought before it regarding article 3 of the First Protocol so far, suscribes to this interpretation (55).

22. We now distinguish between two kinds of restrictions on the right to vote. The first are conditions without which the right to vote does not even exist for the person in question : requirements of citizenship, age, residency, capacity. The second kind are exclusions, or disenfranchisement of individuals as categories of people on grounds closely related to the further qualifications « free », « genuine » etcetera. It is more logical to examine the latter kind at that proper place. In matters of political rights, a distinction drawn upon nationality is legitimate in international law and the denial of the franchise to aliens is not perceived as a discrimination. Some authors advocate to grant noncitizens the right to vote (56) and nothing prevents a State to do so : some countries have accorded passive and active voting rights in municipal elections to aliens who have their habitual residence in that country (57). Further reasonable and noncontroversial requirements are minimum age (16 years in some, 18 to 21 in most countries), mental ability and residence (58). On two occasions, the European Commission advanced a number of reasons justifying the residence requirement :

(52) 530/59 (Netherlands), *Yearbook III* (1960), 188. The freedom of expression (art. 10 European Convention) does not guarantee the right to vote as such, 6573/74 (Netherlands), *DR* 1 (1975), 89 — or to participate in a referendum, 7096/75, *o.c.*, 166.

(53) 2728/66, *o.c.*, 336.

(54) 6745 and 6746/74, *o.c.*, 116.

(55) Mathieu-Mohin and Clerfayt judgment, *o.c.*, §§ 47-51.

(56) « In longer-term perspective (...) even such residual concessions to territoriality would presumably become functionless and unnecessarily », McDougal, M. S., Laswell, H. D. and Chen, L.-C., *Human Rights and World Public Order*, Yale University Press, New Haven and London, 1980, 743.

(57) For instance : Ireland, Sweden and the Netherlands.

(58) « Amongst the conditions commonly imposed in Convention countries on their Parliamentary elections are citizenship, residence and age », 8873/80 (U.K.), *DR* 28 (1982), 103 ; 7566/76 (U.K.), *DR* 9 (1978), 122, « The Commission regards these requirements as *conditions*

« Reasons justifying, in the opinion of the Commission, the residence requirement complained of here are : first, the assumption that a non-resident citizen is less directly or continuously interested in, and had less day-to-day knowledge of its problems ; secondly, the impracticability for Parliamentary candidates of presenting the different electoral issues to citizens abroad so as to secure a free expression of opinion ; thirdly, the need to prevent electoral fraud, the danger of which is increased in uncontrolled postal votes ; and finally the link between the right of representation in the Parliamentary vote and the obligation to pay taxes, not always imposed on those in voluntary and continuous residence abroad » (59).

« (...) thirdly, the influence of resident-citizens on the selection of candidates and on the formulation of their electoral programmes ; and finally, the correlation between one's right to vote in Parliamentary elections and being directly affected by acts of the political bodies so elected » (60).

Literacy and *a fortiori* minimal education are more debatable requirements as they can be both « on their face » as « as applied » a means to discriminatory disenfranchisement of certain segments of the population.

Genuine elections

23. The interpretation of the need for « genuine » (Universal Declaration, Civil Covenant, American Convention) « honest » (American Declaration) and/or « free » (American Declaration, First Protocol to the European Convention) elections is twofold, referring at least to the circumstances surrounding the election process : the integrity of the electoral process and the prohibition of fraud or otherwise « rigged » elections. Genuine elections require the absence of coercion. The decision to vote in a particular way may not be pressed upon an elector and he may not be hindered in the casting of the ballot. Ideally, elections should be held in a peaceful and tranquil (pre-)electoral period. This may call for demilitarization of the area in which elections are to take place or on the contrary and as the case may be, for an international peace force to maintain law and order (61).

referred to in this provision, which provided that they are not arbitrary, ensure the free expression of the people in the choice of the legislature », 8873/80, *o.c.*, 103. The European jurisprudence on residence is ample. The European Commission accepted exclusion of overseas residents in the cases 8987/80 (Italy), *DR* 24 (1981), 196 ; 1065/61 (Belgium), *CD* 6 (1961), 53-54 ; 7730/76 (U.K.), *DR* 15 (1979), 138-139 and of a citizen not residing in the constituency where he wanted to be registered as an elector in 7566/76, *o.c.*, 122-123. A complaint of a U.K. citizen that he was excluded from the right to vote for the U.K. parliament because he was a resident of Jersey which is regarded as British territory outside the U.K. and therefore no part of a particular constituency was declared inadmissible in 8873/80, *o.c.*, 99-105.

(59) 7566/76, *o.c.*, 122-123.

(60) 7730/76, *o.c.* 138-139. The first two reasons given in this decision are identical to the first two in 7566/76. Such requirements are furthermore a distinction based on an objective circumstance (residence abroad) and do not constitute a discrimination by comparison to resident citizens within the meaning of article 14 of the Convention 8987/80, *o.c.*, 196 — nor by comparison to servicemen and members of diplomatic families who are exempt from the residence requirements (or rather, not regarded as non-residents because of their special situation) — 7566/76, *o.c.*, 123 ; the aim pursued is legitimate and not a disproportionate means to achieve this end. See also 8612/79, *o.c.*, 264 for the elections of the European Parliament.

(61) Such a force was present for instance in the 1935 Saar plebiscite and in the 1966 Domi-

The secrecy of the ballot is only a further elaboration of this requirement. Genuine elections also require a fair and accurate reporting of the votes, impartiality of the election administration and eventually, the actual installation of the elected candidates.

24. Do genuine elections refer only to the conjuncture under which they are held or to the quality of the choice to boot? The answer seems to be in the negative. Although the regional systems in Europe and the Americas have rejected a one-party system as being contrary with their view of democracy, both European and Interamerican Commissions deduct the prohibition of single-party regimes from more than the word genuine (it does not even figure in the European Protocol) or free. For the European Commission, « free » bears on nothing more than the act of choosing. The right to free elections primarily signifies that the elections must not be influenced by any form of pressure in the choice of one or more candidates and that the elector should not be unduly induced to vote for one party or another (62). It is from the underlying purposes of the Convention and from the word « choice » that the Commission concludes that there must be a real choice, in other words that the different political parties must be ensured a reasonable opportunity to function and present their candidates at elections (63).

In the Interamerican convention, an earlier draft which proposed as art. 23 § 1 (D) the right « to belong freely to political parties whose functioning should be protected by law » was rejected from the ultimate version (64). Deletion of this subparagraph never altered the basic democratic aims of the Organization of American States and it did not impede the Interamerican Commission to maintain that governments have the obligation to permit and guarantee the organization of all political parties unless they are constituted to violate human rights (65) and to guarantee circumstances that enable opposition parties to act independently and participate freely

nican Republic elections. See AMATO, D. J., *Elections under International Auspices* 1948-1970 (a Ph. D. dissertation at John's Hopkins University), Baltimore, 1971, 418-420.

(62) 7140/75 (U.K.), *DR* 7 (1977), 95. 8364/78, *o.c.*, 251. Also, the European Commission said that whereas « free » bears on the act of choosing, it does not mean for instance that the vote may not be compulsory, 1718/62 (Austria), *CD* 16 (1965), 30.

(63) 7140/75, *o.c.*, 96 ; 8941/80 (Iceland), *DR* 27 (1982), 150. In the famous Greek Case, the European Commission found another persistent breach of art. 3 of the Protocol in that political parties were prohibited and could not be reorganized or have their charter approved : The Greek Case, *o.c.*, 180.

(64) According to BUERGENTHAL, T. and NORRIS, R. E. (ed.), *Human Rights, the Interamerican System*, Oceana Publications, New York (a looseleaf and updated binder system in 3 volumes), vol. 2, booklet 12, 128, the votes were 6 for (Colombia, Ecuador, U.S.A., Chile, Uruguay, Venezuela), 1 against (Trinidad y Tobago) and 11 abstentions (El Salvador, Honduras, Paraguay, Panamà, Argentina, Brazil, Mexico, Guatemala, Nicaragua, Peru and Costa Rica).

(65) *Suriname Report* (1983), 44. The Interamerican Commission also concluded that the creation of semi-participatory organizations like the People's Committees in Suriname were aimed at preventing popular participation and failed to guarantee the Surinamers political rights, *Ibidem* at 46.

in the country's decision (66) without one party becoming preponderant — which would impede party pluralism, itself « one of the bases of the democratic system of government » (67).

25. Such a common heritage is not present among the Contracting Parties to the United Nations Covenants, however. A ban on one-party regimes in the regional systems stems from underlying purposes or a term, « choice », which is unique for that document. It is not therefore a consequence of a generally accepted concept of democracy and political participation : in some socialist countries minor non-communist parties are allowed to compete in elections (68). The African States too claim that one-party systems and even non-competitive elections are compatible with democracy and that it would be wrong to assume that the enjoyment of human rights is to be found only in the multi-party parliamentary democracies (69). The International Commission of Jurists is of the opinion that the rule of law and human rights can be preserved in a one-party state if some principles are actually observed (70). Among them are the electoral freedom of choice among alternative candidates (71), the freedom to join or abstain from party membership and the existence of effective channels of popular criticism (72).

26. We may conclude therefore that apart from stricter interpretations in regional instruments, genuine elections primarily bear on the act of choosing and the circumstances thereof. Popular sovereignty is more germane to identification with the concept of democracy than the classic liberal principle of separation of powers. A link can be made, however, to a « real choice », if not among parties at least among more than one candidate.

Periodic elections

27. Failure to hold any elections at all is clearly in violation of this provision and may be considered as a gross and indeed consistent violation of human rights. The European Commission implicitly decided that three years was a reasonable period (73) but no direct challenges have been made

(66) *Guatemala Report* (1981), OEA/Ser.L/V/II.53, doc. 21 rev.2, 124.

(67) *Seventh Cuba Report* (1983), OEA/Ser.L./V/II.61, Doc. 29, rev. 1, 177.

(68) The existence of such parties is even explicit in the constitutions of Poland (art. 3, 2), Bulgary (art. 1, 3) and the German Democratic Republic (art. 3, 2).

(69) KHUSHALANI, Y., *o.c.*, 418-421.

(70) *I.C.J.Rev.*, 59-60 (1977).

(71) Or at least an effective say in the selection of the nominee? For an appraisal of the selection process in communist party states, see PRAVDA, A., « Elections in Communist Party States », in *Elections without choice*, HERMET, G., ROSE, R. and ROUQUIE, A. (ed.), The Macmillan Press Ltd., London, 1978, 169-195 especially at 175 et seq.

(72) See also FRANCK, T. M., *Human Rights in Third World Perspective*, Oceana Publications, London, 1982, III, 347-420, especially « the successful *Tanzania contribution* », p. 397 et seq. (by R. MORGENTHAU) and HERMET, G., ROSE, R., ROULUIE, A. (ed.), *o.c.* (with chapters on the elections in Cameroun, Kenya, Tanzania and several other one-party States).

(73) Implicit from 8873/80, *o.c.*, 104.

under the European machinery either by an applicant or *ex officio* by the Commission. We may accept from this that the organization of elections for the legislature as they occur now every six years or less happen within reasonable intervals (74). Not surprisingly, it is unacceptable in the eyes of the Interamerican Commission for some governments to maintain themselves in power indefinitely (75). A postponement of all elections for ten years, however, contradicts the Article XX of the American Declaration (76). Since not every period (at least not ten or more years) is approvable, it seems that the Interamerican Commission applies a standard close to the reasonableness test of the European Convention.

Universal suffrage

28. Deprivation of the right to vote may only be permissible on objective and reasonable grounds. Disqualifications on grounds of property or level of income would be inadmissible. A literacy test which could be legitimate in a country where a large majority of the citizens enjoy elementary education, would be discriminatory if as a consequence an entire ethnic group or a large part of the population were barred from participation in elections. Disqualification exists in many countries with regard to prisoners or ex-prisoners who were convicted for grave crimes as an extra punishment pronounced by the judge or sometimes as an automatic consequence of the conviction. Other categories of people are sometimes denied the right to vote (or to be elected) *qualitate qua*, e.g. military personnel in active service.

29. Under the new interpretation of article 3 of the First Protocol (77), the European Commission stated that free elections imply the recognition of universal suffrage and the individual's right to vote in the election provided for in this article, not without adding immediately that these rights are neither absolute nor unlimited and that States may impose certain restrictions on the right to vote and to stand for election, provided not only that they do not interfere with the free expression of the people's decision but

(74) The Greek government argued that it was only two years after the last Parliament was dissolved and that since new elections were forthcoming there was no unreasonable interval and no breach of article 3 of the First Protocol. Even if, for the sake of the argument, the requirement of elections at reasonable intervals were not violated, *quod non*, this would not saveguard the government against the other components of article 3, especially the connection between « expression of the opinion of the people » and election of the legislature, cf. par. 22. The Commission eventually decided that Greece violated the article from the findings, *inter alia*, that the parliament was dissolved on 4 April 1967, that since that date there existed no legislative body in Greece (the May 28 elections were cancelled) and the entry into force of the new Constitution which provided for new elections was delayed and no electoral law yet promulgated. The Greek case, *o.c.*, 180.

(75) *Suriname Report* (1983), 44.

(76) *Annual Report* 1977, OEA/Ser.L./V/II.43, Doc. 21, 93.

(77) See par. 27. At first the European Commission drew from the text of this article the conclusion that the exclusion from the franchise of particular persons or groups of persons was only inadmissible if by such exclusion the « free expression of the opinion of the people » were prevented, 1065/61, *o.c.*, 268.

also that they are not arbitrary (78). It is thus in the nature of this individual right that a complaint by a citizen under article 25 of the European Convention that he was prevented from voting consequently gives rise to an examination by the Commission whether or not this negative condition is fulfilled (79). The criteria for consideration of differences in treatment are found in the Belgian Linguistic Cases (80) and are (i) objective and reasonable justification of the measure and (ii) reasonable relationship or proportionality between means employed and the aim sought to be realized. The Commission thus giving the States a margin of appreciation subject to European scrutiny, assessed a number of vote deprivations with these criteria. The Commission allowed the (temporary) loss of the franchise as a penalty on a particular offence or even regardless of the nature of the offence and without exception, for certain convicts serving their sentence (81) or even beyond their sentence (82) and permanent deprivation of the right to vote to prevent future political misuse, as a consequence of *incivisme* or uncitizenlike behaviour or a conviction for collaboration with the enemy during the war (83).

30. The Civil Covenant, however, has been violated by Uruguay because of its unreasonable deprivation of the right to vote from individuals who were engaged in pro-Marxist activities or tried for political offences (84).

Equal suffrage

31. Besides explicit conventions on equal enjoyment of political rights (85) and specifie nondiscrimination provisions (86), equal suffrage indicates that every individual in principle has the right to vote and that every elector has the same voting power. This, however, does not imply

(78) 6745 and 6746/74, *o.c.*, 116.

(79) 6573/74, *o.c.*, 89.

(80) Judgment of 23 July 1968, *Publ. Eur. Court H.R.*, Series A. vol. 6.

(81) 530/59, *o.c.*, 188 ; 2728/66, *o.c.*, 336 ; 4984/71 (F.R.G.), *CD* 43, 28.

(82) 9914/82 (Netherlands), *DR* 33 (1983), 245-246. The notion of dishonour that certain convictions carry with them may be taken into consideration in respect of the exercise of political rights.

(83) 1028/6 (Belgium), *Yearbook IV* (1965), 338 ; 6573/74, *o.c.*, 89 ; 8701/79 (Belgium), *DR* 18 (1980), 250. In the last case the European Commission also rejected explicitly a complaint based on article 3 of the First Protocol jo. 14 of the Convention.

(84) « The Human Rights Committee is aware that under the legislation of many countries criminal offenders may be deprived of certain political rights. Accordingly, article 25 of the Covenant only prohibits 'unreasonable' restrictions. In no case, however, may a person be subjected to such sanctions solely because of his or her political opinion (articles 2 [1] and 26). Furthermore, in the circumstances of the present case there is no justification for such a deprivation of all political rights for a period of 15 years ». Consideration 15 of the Weinberger Weisz case, *o.c.*, 248.

(85) Cited above par. 4.

(86) See American Declaration, article II jo. XX thus applicable to political participation, Civil Covenant, art. 2 § 1 jo. 25, European Convention, art. 14 jo. art. 3 First Protocol, American Convention, art. 1 jo. 23 (but see article 23 § 2 which allows regulation of the exercise of the right to vote *inter alia* on the basis of language) and African Charter, articles 2 and 18 § 3 jo. 13.

that each vote has the same effect : from the fact that each vote casted must have the same weight (equal *suffrage*) does not follow that the electoral system requires proportional representation or equal voting influence (equal *ballot*) (87). Art. 3 of the First Protocol does not impose a particular kind of electoral system which would guarantee the number of votes cast to be proportionally reflected in the composition of the legislative assembly (88). Both the proportional representation system and the single majority system are therefore compatible with article 3 of the First Protocol (89). The European Commission did not accept complaints of liberal voters in the United Kingdom that the latter system was a discrimination on the ground of political opinion and party affiliation, deliberately continued by both Labour and Conservatives and as such a breach of article 14 of the Convention with article 3 of the First Protocol (90). Neither is the application of a different electoral system in Northern Ireland with the rest of the U.K. in violation of article 3 taken alone or together with article 14 of the Convention (91). In this case, the party that would otherwise profit from the majority rule complained that the British government imposed a proportional representation form for the European elections. The purpose, to ensure that the rights of the minorities in that area would be protected through political representation was however an acceptable differentiation for the Commission. In this case the Commission nevertheless made a slip of the tongue, saying that « (...) on the contrary, a system taking into account the specific situation as to majority and minority existing in Northern Ireland must be seen as making it easier for the people to express its opinion freely ». Is this not a concession that the popular expression of opinion is less free under a single majority system?

32. A difference in size of the constituencies is not in contravention of article 3 either. This may be aimed at guaranteeing the inhabitants in less populated areas a minimum representation but in any case, article 3 of the First Protocol « does not stipulate that the weight of votes behind each Member of Parliament shall be equal » (92). This decision seems to be in

(87) The United Kingdom and France had objections to the phrase « universal and equal » in the Civil Covenant but eventually withdrew their proposals to delete the words, see PARTSCH, K. J., *o.c.*, 240.

(88) 7140/75, *o.c.*, 96-97.

(89) Article 3 « does not create any 'obligation to introduce a specific system' (...) such as proportional representation or a majority voting with one or two ballots. (... It does not follow) that all votes must necessarilly have equal weight as regards the outcome of the election or that all candidates must have equal chances of victory. Thus no electoral system can eliminate 'wasted votes' », Mathieu-Mohin and Clerfayt judgment, *o.c.*, § 54.

(90) 8765/79 (U.K.), *DR* 21 (1981), 211.

(91) 8364/78, *o.c.*, 251-252.

(92) In Iceland, voters of one constituency had up to 4.8 times the voting power of voters from the most densely populated constituency. This discrepancy « cannot be considered to be of such a degree as to be arbitrary or abusive », 8941/80, *o.c.*, 150-151. Compare with the almost perfect mathematical equality which the United States Supreme Court requires for its « one man one vote » rule in congressional elections (for example, Karcher v. Daggett, 103 S.Ct. 2653

contradiction with the concept of voting rights as individual rights and not as the right to representation of territories, corporations or other groups (93).

Secret ballot

33. Practices such as the use of colored ballots or having an elector enter the voting booth only in case he wants to change the order of the candidates are in contravention with the secrecy provision. The secrecy requirement is especially important in isolated areas where the voters depend for their livelihood on the commercial domination of the local chief (94). Exceptional accommodations to the principle may be required for illiterates or the handicapped. Whereas the casting of the ballot should be secret, the counting must be public to observation by party officials.

The right to stand for election

34. The right to be a candidate has been linked with aspects of the right to vote in the preceding paragraphs (95). It is also linked to the right to form political parties. To be effective, it follows that elected candidates must be able to carry out their functions without hindrance (96). Fewer rules are given for this right than for the active voting rights but, similarly, conditions on the exercise of this right that are not arbitrary are permitted. Thus most instruments entitle the right to stand as a candidate only to citizens. The jurisprudence of the European Commission may give us guidance on the reasonableness and proportionality of certain limitations :

— Age limits of 25 (House) or 40 (Senate) for those who wish to stand for election in Belgium cannot be regarded as an unreasonable or arbitrary condition. « Obviously », says the Commission as to the 25-year limit. As for the senatorial age minimum in a bicameral system it is « not arbitrary to arrange things so that one House is composed of those who by virtue of their age have acquired greater political experience » (97). An overall 40-year limit for both House and Senate would therefore not be acceptable.

— One cannot avail himself of the protections of the European Convention with the incompatible purpose to destroy the same (98). One cannot

[1983]) or even with the legitimate state considerations required for State or local elections (e.g. Mahan v. Howell, 410 U.S. 315 [1973]). But even this rigid Court is prudential as it accepts the districting system and winner-takes-all rule of American elections.

(93) FROWEIN, J. and PEUKERT, W., *Die Europäischen Menschenrechtskonvention*, Engel Verlag, Kehl-Strasbourg, 1985, 291-292 ; NOWAK, M., « Das Wahl- und Stimmrecht als Grundrecht in Österreich », 10 *EuGRZ* 100 (1983) ; see also the concurring opinion of PINHEIRO FARINHA in the Mathieu-Mohin and Clerfayt judgment, *o.c.*, p. 30.

(94) For some examples of such practices, see ROUQUIE, A., « Clientelist control and authoritarian contexts », in *Elections without choice*, *o.c.*, 28-29.

(95) See par. 28 and also §§ 15, 24 and 33.

(96) On the stripping of membership of parliament, UNHRCee, Mpandanjila v. Zaire (138/1983), 7 *H.R.L.J.* 277 (1986).

(97) 6745 and 6746/74, *o.c.*, 117.

(98) Article 17 : « Nothing in this Convention may be interpreted as implying for any State,

invoke, for example, the use of article 3 of the First Protocol to support a candidature founded on a platform of racial discrimination (99). This idea of self-protection is generally recognized (100).

— Apart from their objectives, the admission of parties, the exponents of political ideas and carriers of candidates, may also be conditioned. The European Commission did not condemn the requirement of 100, 200 or 500 certified signatures for the presentation of an electoral list as a fetter on the free expression of the popular opinion, arguing that any party with a reasonable chance of success could meet this number (101). The Commission was of the opinion that such requirement serves the purpose of constituting the character of the political process as a public one, avoids confusion of the electorate by groups which cannot assume political responsibility and accordingly circumscribes these rights in such a way that they cannot be exercised by an individual acting alone (102). In other parts of the world however, putting a signature may be a dangerous act and it may be that few people who would support a list in the secrecy of the booth would dare to sign the charter or the list openly. Other barriers to the ballot (filing fees, early deadlines, geographical distribution of names on the petition) can all be reasonable and rational but are in some countries effective restrictions on the formation of third parties or on their campaigning. The Commission stated, however, with some selfrighteousness that « the fear of discrimination against those who express their support by their signatures is wholly unfounded with respect to democratic parties » (103). Other case-law also justifies the same condition to challenge the election results (104). Campaigning restrictions that apply equally to all parties and candidates would also be reasonable (105).

— An election campaign subsidy does not limit the right to stand as a candidate. Its purpose is to make parties more independent of outside pressures and influences. Subsidies based on the election outcome reflect the real importance of the party. Neither the subsidy nor the way in which it is allotted violates the free expression of the people (106).

group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention ». See also art. 29 § 3 and 30 Universal Declaration, Article 5 Civil Covenant ...

(99) 8348/78 and 8406/78 (Glimmerveen & Hagenbeek v. the Netherlands), *DR* 18 (1980), 187. See also 250/57 (K.P.D. v. F.R.G.), *Yearbook I*, (1957) 222.

(100) E.g. the obligation for American States to permit the organization of political parties « unless they are constituted to violate human rights », *Suriname Report* (1983), 44 ; UNHRCee, M. A. v. Italy (R26/117), 5 *H.R.L.J.* (1984), 191 : conviction for reorganizing the dissolved fascist party « were of a kind which are removed from the protection of the Covenant by article 5 thereof ».

(101) 7008/75, *o.c.*, 121 ; 6850/74 (F.R.G.), *DR* 5 (1976), 94.

(102) 6850/74, *o.c.*, 94 ; 8227/78 (F.R.G.), *DR* 18 (1979), 181.

(103) 6850/74, *o.c.*, 94.

(104) 8227/78, *o.c.*, 180.

(105) SIEGHART, P., *o.c.*, 364, citing a decision of the Italian *Corte Suprema di Cassazione.*

(106) 6850/74, *o.c.*, 93-94.

Related and conditional rights

35. Some related civil and political rights must also be protected and guaranteed in order to create an atmosphere in which true political participation and selfdetermination can develop : freedom of the press and free and fair access of all political organizations to the media, the freedom of assembly and association and to organize intermediate groups. As political participation of the people is the fundament for a governments' respect for human rights, respect for these human rights are also a prerequisite for free elections. The Interamerican Commission, for example, imposed an obligation on States to permit not only political parties but also « other associations » and open debate of the principal themes of socio-economic development (107). The proposals of the European Commission in the Greek case were, *inter alia* :

> « (9) Information or comments in the press should not be subject to any sanctions for the sole reason that they are critical of the government ; (10) *necessary conditions* to assure 'free expression of the opinion of the people' (which should be established *before free elections* can be held) imply
> * freedom of association, for the purpose of forming political parties,
> * freedom of assembly for the purpose of holding political meetings and
> * freedom of expression (... with reference to proposal n° 9) » (108).

Most of these related freedoms are protected in the same international documents (plus the Covenant on Economic, Social and Cultural Rights and the I.L.O. Conventions). Trade union freedom is primarily protected by the I.L.O. Conventions.

36. The rights to vote and to stand for election have also been described in corresponding terms of duties (109) : every citizen has duties towards the Community, one of them is the duty to respect and protect the democratic government of his State. Consequently, it is a duty of every citizen to vote and if elected, to fulfill his office and serve, unlike General William T. Sherman ... (110).

ELECTION OBSERVATION

Election observation and customary law

37. Election observation is a particular form of fact-finding with the purpose to attest to the fairness and freeness of the election for the benefit of the indigenous population and to convince the international community

(107) *Suriname Report* (1983), 44.

(108) The Greek Case, *o.c.*, 515.

(109) See American Declaration, articles XXXII and XXXIV, African Charter, articles 27 and 29 ; DAES, E.-I. A., *o.c.*, 60 ; MARCIC, R., « Duties and Limitations upon Rights », 9 *J. I.C.J.*, 61 (1968).

(110) William Tecumseh Sherman, one of the Union generals in the American Civil War who, unlike Grant, refused to became involved in politics, saying he would not run for president if nominated and would not serve if elected.

of the genuineness of the expression of the popular will within a particular country (111). Fact-finding is not a new event : in 1907 a Hague Convention provided for fact-finding rules but the process was in those days merely seen as a means of settling disputes between States (112). Article 33 of the United Nations Charter still mentions inquiry as one of the peaceful means by which the parties to any dispute shall seek a settlement. In the human rights area, fact-finding has distinct characteristics. The approach here is to gather facts which substantiate or dismiss accusations of human rights violations or, more in general, to verify the discharge by States of the obligations assumed in human rights. This is not an adjudicatory function but primarily one of promotion and restoration of human rights. Certain fact-finding rules do not necessarily apply : for example, consent of the State concerned is no prior condition to the conduct of a mission. Evidence of human rights violations is frequently available outside the country and on-site visits are not always necessary for effective fact-finding. Indeed, most investigations are even conducted without such visits (113) and the consent and co-operation of subject States have not regularly been required for the establishment of inquiry commissions. Even United Nations fact-finding proceeds over strong objections and continuous opposition of the accused States (114). When States insist on their selfinterest and are not willing to co-operate, fact-finding has a tendency to become ambiguous in the light of due process rules.

38. Observation missions are different from other fact-finding missions in that they have to observe an actually ongoing event. Election observation is primarily *ad hoc fact-finding* (115) and, from its nature, an on-the-spot form of fact-finding. Hence, co-operation of States poses a more important problem for observer missions than for inquiry missions. Moreover, elections involve a whole country and its entire population, unlike trial observation which is confined to a certain area (courtroom, prison) and a limited number of affected persons. We have to examine therefore, whether election observer teams should be permitted to enter a country as a matter of right, more in

(111) AMATO, D. J., *o.c.*, 20.

(112) See VALTICOS in his foreword to RAMCHARAN, B. G. (ed.), *International Law and the fact-finding in the field of Human Rights*, Martinus Nijhoff, The Hague, 1982.

(113) WEISSBRODT, D. and MCCARTHY, J., « Fact-finding by International Nongovernmental Human Rights Organizations », 22 *Va J. Int. L.*, 59.

(114) For example, South Africa, Chile, Israel. ERMACORA, F., « International Enquiry Commissions in the field of Human Rights », 1 *H.R.J.*, 206 (1968), (herinafter cited as *Enquiry Commissions*). 187-196 ; WEISBRODT, D., and MCCARTHY, J., *o.c.*, 19-20. The U.N. seems paralyzed by art. 2 § 7 of its Charter when it comes to any form of activity *inside* a State.

(115) ERMACORA classifies three forms of fact-finding in the field of human rights : institutionalized fact-finding, indirect fact-finding in the case of periodic reports without specific consequences and *ad hoc* fact-finding by intergovernmental, nongovernmental and purely private organizations. ERMACORA, F., « *Enquiry Commissions* », 186-187. On the extensive experience of the I.L.O., see VON POTOBSKY, G., « On-the-spot visits : an important cog in the ILO's supervisory machinery », in 120 *Int'l Labour Rev* 581-596 (1981).

particular as a general rule of international customary law or as a qualified rule depending on the type of the mission or the type of election.

39. The first part of this article has been devoted to the treshold question that the situation referred to must fall within the domain of international relations (116). The Statute of the International Court of Justice further gives the equivalent of a statutory definition (117) of customary law, speaking of « international custom, as evidence of a general practice accepted as law », thus enunciating the two criteria that must be satisfied for this « mysterious phenomenon » (118) of formation of customary law to happen : (i) a general practice among nations and (ii) acceptance of that custom as giving rise to a legal obligation. These elements are referred to as the material and the psychological elements, a distinction which originated in an 1899 publication by the French publicist François Gény, « *Méthode d'interprétation et sources en droit positif* ».

(i) material element, usage or general practice among nations

40. Some modalities are required to measure the material element or at least to make the practice visible as a custom : duration, continuity, repetition, generality and uniformity.

41. *Duration.* As such, duration is not an essential requirement in that the time needed to form a custom varies according to the nature of the case. The practice of election monitoring is not a new one. As early as 1857 were the first elections under international auspices organized, namely the election to the assemblies of the two Danubian principalities Moldavia and Wallachia, now better known as Rumania (119). Between the World wars, a number of plebiscites were organized as a consequence of the peace settlement of Versailles. The practice continued after the second World War with the elections in Greece and has continued ever since. The custom could only rise significantly from the moment that the underlying right,

(116) D'AMATO, A. A., *The Concept of Custom in International law*, Cornell University Press, Ithaca, 1971, 58 ; WALDOCK, H., « General Course of Public International Law », *Recueil des Cours*, 1962, II, 41.

(117) Article 38(b) Statute I.C.J.

(118) KUNZ, J. L., « The nature of Customary International Law », 47 *A.J.I.L.*, 666 (1953).

(119) WAMBOUGH, S., *A monograph on plebiscites with a collection of official documents*, Oxford University Press, New York, 1920, 101 : « For the first time in history an International congress of great powers, which had met to settle the future of a small, weak and disunited people, postponed their action until they should have ascertained the desire of the people themselves, and, as a further innovation, they provided that this desire should be expressed by a vote taken under the supervision of an international commission ». Because of the competing interests of the European Powers of that time, this supervision was more like a game of political theatre and the abuses during the drafting of the electoral lists and the voting itself resembled a parody. Eventually, under threat of war, the elections were annulled, new electoral lists ordered and the elections held once more, this time as fair and impartial as possible, WAMBOUGH, S., *o.c.*, 101-122.

the right to political participation, was recognized as part of international law. And so it did.

42. Another element is the technical possibility to send a mission. The number of missions has grown after the Second World War (as has the number of countries). The conditions of transportation of men and money improved. International communications also made it possible to learn faster about upcoming elections and to dispatch observers swiftly. This communication factor also brings about an element of notoriousness which may be on itself more basic than the mere fact of duration. All in all, it seems that the duration standard has been met.

43. *Repetition.* Especially in Latin-American countries but also elsewhere, several elections have been monitored in the same country. Numerous missions have been sent to diverse countries over time and the practice's frequency and consistency meets this consideration. This element ought to be less important, however, since it can only be required of those States which the custom affects and election missions are only established on those occasions when human rights interests are at stake.

44. *Continuance.* The density of a practice depends on the nature of the case too, and a possible single act of not receiving a mission by a State is no proof of disuse. On the contrary, the practice is very regular since W.W. II and this qualification arguably makes no problem.

45. *Generality.* Another requirement in determining whether election observation is accepted as a rule of customary law, the practice should be observed by diverse States. Geographical, ideological and economically diverse States should and do observe the practice. « General » is not universal, but a mere majority of States is not enough (120), the practice of receiving observer missions must have been applied by the overwhelming majority of the « specially » affected States. These are the States which hitherto had an opportunity of applying it (121), i.e., that hold the kind of elections where observers might be necessary or useful. Elections have been observed by international teams in Europe, South America, Africa, Asia and Oceania, in industrialized countries and developing countries, in free market, closed and mixed economies (122). Even so, it is a fact that Soviet

(120) KUNZ, J. L., *o.c.*, 666 ; WALDOCK, H., *o.c.*, 44. However, in the 1927 Lotus case the P.C.I.J. cited precedents from only five countries (*PCIJ Rep.*, Ser. A, n° 10, 29) and in the 1923 Kiel Canal case only two (*PCIJ Rep.*, Ser. A, n° 1, 15, 25, 28) !

(121) KUNZ, J. L., *o.c.*, 662.

(122) Some examples : in Europe, Moldavia and Wallachia (1857), Schleswig (1920), Allenstein, Klagenfurt, Basin, Marienweder, Upper Silesia, Sopron (1921), Saar (1935, 1955), Greece (1946), Tenda-Briga (1947), Gibraltar (1967) ; in Asia, Korea (several times between 1948 and 1970), Cambodia (1955) ; in Africa, Togoland (1956, 1958), Cameroon (1959, 1961), Ruanda-Urundi (1961), Equatorial Guinea (1968), Sudan (1953), Zimbabwe (1969, 1985), Uganda (1980) ; in Oceania, Western Samoa (1961), Cook Islands (1965), Mariana Islands (1975), Micronesia (1983) ; in South America, almost every country.

bloc countries have never accepted any such missions (123). However, most missions dispatched by the United Nations to supervise or observe elections in its former trust territories and in other dependent territories have been voted with the consent of a majority of all U.N. Members. From that we can also conclude that most States agree to this practice, even from those where the opportunity to apply the practice has not yet occurred and no missions have been sent to their country. Moreover, in those U.N. missions representatives from all parts of the world were appointed as observers, including socialist countries. Although the U.N. missions are not conclusive arguments for the overall practice (124), the standard of diversity is sufficiently met.

46. *Uniformity.* This final factor means that such a custom should have universal application — not that every single State participated in its formation. Neither does uniformity require unanimity in observance (125). The number of States where elections have been observed is indisputable large enough to testify for its uniformity. On occasion, State officials regard the mission as interference but yet grant them official status (126) or governments do not feel that the particular elections at the time present any problems in need to be observed but yet permit a mission to come (127).

47. From the preceding paragraphs can be concluded that the material element, the general practice to receive international election observers, is present. Whether all five enumerated elements are conditional to every customary rule or not, or in various degrees, of whether they are only modalities that make a custom visible and must therefore be treated just as indices whose value may vary and where absence of one is compensable by another goes beyond the scope of this article (128) and does not, in our opinion, influence the conclusion.

(ii) psychological element, *opinio iuris sive necessitatis*

48. In order to be customgenerating, the practice must also be accepted as law in the international community. The practice should not only be a collective one, but « reflect widely held opinions and represent a broad consensus with regard to the content and the applicability of certain

(123) Are Soviet bloc countries « specially affected States? ». It is questionable whether many missions would be sent over under the standard that only significant elections should be monitored. The U.N. has once considered to take action in relation with the political rights of the German population : see par. 10.

(124) The U.N. responsibility towards its trust territories and the role of the Organization in the decolonization sets it apart from other election observation, see par. 54-56.

(125) KUNZ, J. L., *o.c.*, 666.

(126) For example, French Togoland 1958 and U.N. mission.

(127) For example, Uruguay 1984 and NGO mission.

(128) Compare for example D'AMATO, A. A., *o.c.*, 56-66 with WALDOCK, H., *o.c.*, 43-44.

substantive norms » (129). And not only must the States which applied the practice have had this conviction, it must not have been challenged by other States. Weissbrodt advocates the existence of *opinio iuris* in relation to trial observation as follows :

> « However, most countries have accepted observers in the past in recognition of an internationally guaranteed right to an open trial.
> Hence, a strong argument can be made that the acceptance of international trial observers has become a rule of customary international law. The practice is well established and accepted within the international community ; those nations which on occasion resist accepting trial observers have not condemned the practice itself. Even if a nation believes it is not bound by customary international law to admit foreign observers to its political trials, it may feel constrained to do so to be consistent with international practice and to demonstrate the fairness and openness of its criminal justice system » (130).

The practice of receiving election observers is also well established and there are States who objected to the mission but did accept their arrival (131). This may prove that they acted in the opinion of the existence of a legal obligation that pushed aside their unwillingness. Certain States however stated that the reception was a privilege and not a prerogative and States who deny observers entrance to their country do so invoking domestic jurisdiction arguments. Do these verbal statements, however wrong they may be as argument, reflect the « state of mind » of those States? Or are there political and not legal reasons for which a State chooses to speak in the negative and even act accordingly?

49. Even States which invite missions may not send such invitation because of a presumed legal obligation but with political goals to gain support, to legitimize the authorities or to improve their standing in the international community or even only to receive additional technical assistance in computing the election results. One country which does invite observers with a commitment to set out an example of democracy to its neighbours is Costa Rica. The attitude of delegates at the United Nations may be evidence of the State's « *opinio* » and then again it may not, since standpoints expressed in the General Assembly are often of a political nature and do not express legal principles (132). What State organ is

(129) VAN BOVEN, T., « Survey of the positive International Law of Human Rights », in *The International Dimensions of Human Rights*, Vasak, K. (ed.), Greenwood Press, Westport, 1982, I, 106.

(130) WEISSBRODT, D., *o.c.*, 41. *Contra* : MARTIN-ACHARD, « Political Trials and Observers », 6 *I.C.J. Rev.*, 32-33 (1971).

(131) AMATO, D. J., *o.c.*, 71-72 (France for elections in Togoland 1958, although the French delegation objected to U.N. supervision and they explicited that they did not object to « watching » the conduct of the referendum) and 310-312 (Spain for elections in Equatorial Guinea 1968) ; Report on the elections in Uruguay 1984, International Human Rights Law Group, on file with the I.H.R.L.G.

(132) U.N. Declarations are at most evidence of international principles, but may by custom become recognized as laying down rules binding on States (E/CN.4/L.640) but speeches of individual representatives do not fall under such category.

qualified to express a State opinion and how do we have to interpret its expressions? One can easily find examples in the negative where observation has been denied, which can be interpreted as absence of *opinio iuris*, merely as a particular policy of that State in those circumstances or as a violation of international law. Indeed, violations may repeatedly occur without changing the State's conviction that these acts constitute violations. They may also have been committed as a step towards disuse or with the *opinio* to create new international law. But in order to violate such custom, the rule must first be established as such : a vicious circle !

50. Because it is so difficult to prove independently the « *animus* » of a State as well with the States complying with the practice — not all are as straightforward as Costa Rica — as with the other, some writers suggest that the « psychology » of nations can also be deducted from the material element of custom alone. In other words, the very strong established practice would by its frequency alone generate a conviction of legal duty so that *opinio iuris* may be presumed upon a *prima facie* showing that the usage is unusually well established and widespread (133). In fact, that is basically how Weissbrodt argued his case on trial observation. But then, the underlying right to an *open* trial — so why not open to foreigners — is more convincing than the deduction of election observation from free elections might be. It is of course arguable that observation of elections is inherent to the right protected too. The reason for having open trials is to guarantee their honest conduct and a similar logic can be applied to the election process. That the right to elections implies some form of checking could be deducted from the words « genuine » and « honest ». No other qualification in the international sources (secrecy, periodicality, ...) permits such deduction. Or it would be found in the general idea of the meaning of « elections ». The latter is a shaky position however, to find more requirements in the right to political participation after all those instruments have gone out of their way to describe and qualify it. And we have seen before that the word « genuine » can be restricted very much to absence of outside pressures only. Furthermore, any complaints against insincere elections can and should be brought before the internal judicature, while it is necessarily their honesty and independency that must be checked in the case of political trials. To stretch the argument it could be said, however, since the independency of the judicature or the *trias politica* may not be guaranteed, that some international supervision should always be allowed for any human rights provision triggering active State involvement. This would require observation of a States' compliance with a lot of human rights obligations,

(133) D'AMATO discusses the impracticalities and even logical contradictions of the *opinio iuris*, *o.c.*, 51-54, citing Gihl, Kelsen, Guggenheim, De Visscher, Wolfke, Séfériades and Sorensen. KUNZ, J. L., *o.c.*, 667 adresses the same dilemma citing Kelsen, Verdross. WALDOCK, H., *o.c.*, 46-49 cites De Visscher, Kelsen, Fischer, Williams and Sorensen.

not only free elections and open trials, but many cultural rights too, for example the right to education. Such a risky assumption is not yet accepted in international law.

51. Permission of a trial observer infringes less on the States' sovereignty than elections observers, if only in a practical way. Since the trial, as we have said above, is much more limited in space than an election, a trial observer could function just by being there and far less facilities could be allowed to him in order to let the observation function, e.g. a visit with the judges and other magistrates and a meeting with the accused(s). An election team however in the nature of its function is generally a much larger body and must be accorded many more facilities. A host State will be obliged to guarantee or at least endure far more diverse actions of the team. If a trial observer must assess existing penal laws, prison regulations etc., an election observer goes to the roots of political rights and is supposed to evaluate the whole political system, constitutional guarantees, electoral laws, ...

52. A number of elements indicate more to the contrary of custom : apart from the trusteeship questions, an on-site investigation by the United Nations never happens without the host State's consent ; Resolution 1503 (XLVIII) of the United Nations Economie and Social Council determines that *ad hoc* bodies appointed by the Commission on Human Rights to investigate individual complaints on human rights violations may undertake them « only with the express consent of the State concerned and (...) in constant co-operation with that State and under conditions determined by agreement with it » (134) ; regional organizations too require consent for on-site investigations. Rather than being written exceptions to a general rule, they make it difficult to conclude that the practice of receiving observers amounts to a rule of customary international law generally applicable in all situations. Instead, it seems important to categorize different types of observation missions. Because of the typical functions of the United Nations, other practices may apply than, for example, for NGO missions, which altogether fall from under the nonintervention principle. Nevertheless, the practice does exist. If one takes the view that all elements of practice and *opinio iuris* are satisfied then it is a rule of customary law and the human rights obligation has ousted the immunity from outside intervention (135). But since co-operation or at least acquiscense of the host State is *de facto* essential, this rule has, absent an international policeman, little chance to become enforceable if a State remains unwilling out of its own mind, and where implementation may be excepted at best with the threat of so-called social sanctions as for instance a « mobilization of shame ».

(134) ESC Res 1503 (XLVIII), E/4832 : Add 1 (1970).

(135) The fact-finding process can no longer be regarded as an intervention — at least if no on-site investigations are to be made.

A nonco-operative government can significantly hinder the proceedings of the mission and can always discontinue or bar the observation completely by forbidding the entry into his territory of the team (136). Even if domestic jurisdiction is set aside as a *principle of law* (for United Nations or other Intergovernmental Organizations) or does not apply (for nongovernmental organizations), it lasts as an *impediment in fact* in the effective administrative control which every State exercises over its boundaries. If we do not accept the practice as a customary rule, the practice, however widespread, falls short of being a normative obligation and carries no legal rights. However, refusal by a State to accept qualified observers can still be justified less and less on the grounds of national sovereignty over its election process in view of the growing concern of the international community. Even then, a State should on principle accept foreign observers according to the usage (which has the same social sanctions attached to it), on the basis of international courtesy and comity. And let us not forget that a norm of « *courtoisie* » may become a norm of customary law, if later on *opinio iuris* is added to the usage.

Typologies

(i) United Nations Organization

53. Being the most universal intergovernmental organization, the United Nations Organization has both specific tasks and plights towards the election process in some territories and may be more restrained to act elsewhere, since its prestige bestows the elections invariably with an image of legitimacy. It seems defendable for that reason that the U.N. should avoid more than any other organization to monitor elections which do not guarantee *prima facie* « genuineness », although the Organization has committed itself in the past to overseeing elections without first determining whether the prevailing conditions were actually conducive to the holding of elections (137).

54. Pursuant to its Charter, the United Nations Organization carries special responsibilities in the administration of *Trust territories*, which is therefore without any doubt of international concern. With the objective of progressive development of these territories towards self-government and independence (138) the United Nations exercised large jurisdiction to organize elections. Not only did the Organization create observer missions

(136) A State may under international law forbid, in its discretion, the entry into its territory without its consent of any person, be he immigrant, visitor or refugee (non-refoulement notwithstanding). D'AMATO, A. A., *o.c.*, 77-78 ; FAWCETT, J. E. S., « Human Rights and Domestic Jurisdiction », in *The International Protection of Human Rights*, Luard, E. (ed.), Praeger, New York, 1967, 287.

(137) AMATO, D. J., *o.c.*, 386.

(138) See art. 76(b) of the Charter.

but these missions were given broad powers extending beyond mere observation. In fact, involvement in the election process can be distinguished from mere observation over supervision to administration (139) and the United Nations has been engaged in all three forms. Eventhough the United Nations has never overseen elections against the objection of the host country, it is dubious how often the consent has been given warmheartedly. Especially in the case of trust territories the United Nations has interpreted its authority, often against the wishes of that host State, to comprise the task of supervising the process. Moreover, the consent has been given by the Host more often than not after fiery debates in the General Assembly and then only reluctantly with expressions that the mission could only come as a matter of privilege and not as a prerogative. Since the United Nations intervened anyway, it is possible to deduce that the Organization concluded that there are reasons why article 2 § 7 of the United Nations Charter was not applicable. Amato gives an in depth analysis of two of such supervisions, the elections in French Togoland (140) and the elections in Ruanda-Urundi (141). The General Assembly resolutions creating both missions provided for a Commissioner or a Commission « who shall supervise the elections » (142). In both cases the administering authorities (France and Belgium) objected vigorously to United Nations involvement (143) and eventually agreed only to observation ... which the United Nations extended to supervision. The Commissioner in Togoland for instance did not hesitate to suggest changes in the electoral laws to rectify problematic situations, and his recommendations were alternatively successful and not (144).

(139) Observation is a purely passive role, the mission merely reports on the conduct of the election, a supervising mission has the authority to advize the host State on the preparations for and actual conduct of the election (for example suggest changes in the electoral laws) and an administering mission has complete control over all the electoral procedures and is at liberty to change anything in the whole election process. AMATO, D. J., *o.c.*, 18-19 and 397-401.

(140) AMATO, D. J., *o.c.*, 46-136.

(141) AMATO, D. J., *o.c.*, 137-239.

(142) Togoland UNGA Res 1182 (XII), November 29, 1957, UN Doc A/3805 ; Rwanda Res 1579 (XV) December 20, 1960, UN Doc A/5684 and Res 1605 (XV), April 21, 1961, UN Doc A/4684/add. 1.

(143) France to the extent of proclaiming Togoland a province and hence integral part of France.

(144) In excess to the « mere observation » of the election process, he

— appealed to the Togoland government to rescind the law disqualifying persons convicted of certain offenses from voting (to no avail) ;

— asked the government to revise the deposit of a candidature fee (again unsuccessful) ;

— requested the authorities to extend the voters registration period (to which the government agreed albeit under extra U.N. pressure) ;

— appealed Lomé to ease its restrictions on public meetings (with no success) ;

— requested that the government appoint politically neutral individuals to serve in the polling committees and liberalized qualifications for the official party observers (both which it eventually did to some degree) ;

— suggested to ink each voters' thumb with indelible ink (to which the government acceded). AMATO, D. J., *o.c.*, 102-129.

55. Although not expressly provided for in the Charter (145), the United Nations has similar responsibilities towards the process of decolonization in *Non-Selfgoverning territories* (NSGT) and has proven this concern in resolutions on the selfdetermination of peoples as for example the Declaration on the Granting of Independence to Colonial Countries and Peoples (146). Again, Amato analyzes how the United Nations supervised elections in such territories, the two NSGT case studies being the Cook Island elections (147) and the elections in Equatorial Guinea (148). In the light of such international concern, the invocation of domestic interference was weak and even if a country has the legal right not to accept a U.N. presence, it would at least be politically disadvantageous to exercise it. In fact it seemed that the administering powers of NSGT did not object on discussion in the U.N. organs and voluntarily submitted information concerning political developments (149). The General Assembly was very active towards several NSGT and freely discussed the political and constitutional changes therein (150).

56. The elections in Korea in the period between the end of the second World War and 1970 are the only elections other than small or Trust territories in which the United Nations has been involved. Moreover, the 1952 Korean by-election was the only instance in which the United Nations observed an election on its own initiative, i.e., without express consent of the Korean government (151). Though not being a trust territory, the war situation in Korea gave significance to United Nations involvement. The case illustrates the willingness of the United Nations to expand the scope of its jurisdiction in certain circumstances (152).

57. In conclusion, the United Nations has a role to play in Trust territories to a great extent, in function of the powers given to the Organization in its Charter in the process of decolonization. In relation to trust territories,

(145) See Chapter XI of the U.N. Charter, Declaration regarding non-self-governing territories.

(146) UNGA Res 1514 (XV), December 14, 1960, UN Doc A/4684.

(147) AMATO, D. J., *o.c.*, 249-303 ; RAJAN, M. S., *o.c.*, 42.

(148) AMATO, D. J., *o.c.*, 304-372 ; RAJAN, M. S., *o.c.*, 47-48.

(149) Sometimes emphasizing that this was not in discharge of any Charter obligation. New Zealand on the other hand invited the U.N. to supervise elections on several occasions (Cook, Niue and Tokelau Islands). RAJAN, M. S., *o.c.*, 39-40.

(150) For example, the General Assembly called upon the United Kingdom to hold general elections in the Fiji Islands based on one-man-one-vote, called for free and democratic elections in Brunei under U.N. supervision, discussed the referendum in French Somaliland and sent observers to the 1967 referendum in Gibraltar and a mission to assist in the organization of elections in Aden. See RAJAN, M. S., *o.c.*, 42-46.

(151) AMATO, D. J., *o.c.*, 376. The government can be presumed to have tacitly consented to the visit. No formal objections were made and for all subsequent elections the U.N. received formal invitations.

(152) A brilliant example where the domestic jurisdiction was totally ignored just because U.N. involvement suited all parties were the events in the Dominican Republic in 1965 described by RAJAN, M. S., *o.c.*, 137-142.

the United Nations has acted to a far extent over governmental objections which were more the airing of political feelings (« *pour la galerie* ») than acceptable legal objections. The Member States have entrusted the Organization further with special responsibilities in the promotion of self-determination, especially in areas where peace may be threatened like those places where a foreign military force occupies the country and in areas where the Organization can accompany transitional elections. United Nations action is a plight to its purposes and responsibilities in these situations. The Organization may leave the observation of other elections to other intergovernmental or nongovernmental organization, unless the Members agree on the significance of that election in case and are guaranteed that the United Nations presence can both influence the election process and fulfill a purpose for the electors and is not merely legitimizing the process (so rather supervision than observance).

(ii) Other intergovernmental organizations

58. The *Organization of American States* has sent several missions to Latin-American States (153). Eventhough the Interamerican Commission has the power to conduct on-site observations in a State, with the consent or at the invitation of the government in question (154), it has not yet done so to observe the conduct of elections. The members of the missions that are designated by the Secretary-General of the O.A.S. serve in their personal capacity. However, since no mission is dispatched without an invitation of the host State to the O.A.S. Secretariat and since the mission receives all material help from the O.A.S. (staff, expenses, report publication) it is correct to speak about if not *de iure*, at least *de facto* O.A.S. electoral presence (155).

59. Opposed to its large jurisprudence in the area of election rights, the *European Commission* has never been active in election observation (156).

60. Just as country missions, IGO missions sometimes have no more than a symbolic value to enhance international prestige or to legitimize the election process. A perfect example is the supervision by the *West European Union* (W.E.U.) of the 1955 Saar referendum. The W.E.U. accepted this responsibility in the aftermath of the second World War primarily to legitimize the entire procedure (157). Other observations do have a real

(153) Costa Rica, Dominican Republic, Ecuador, Guatemala, El Salvador, Panamà, Honduras all have accepted O.A.S. missions.

(154) Art. 18(g) Statute of the Interamerican Commission.

(155) AMATO, D. J., *o.c.*, 514 ; GARBER, L., *Guidelines for International Election Observing*, International Human Rights Law Group, Washington, 1984, 2 (hereinafter cited as *Guidelines*).

(156) Investigating complaints, the European Commission can fulfill a fact-finding role and make on-site visits, which it has done occasionally (14 and 28 Rules of Procedure).

(157) AMATO, D. J., *o.c.*, 507-513.

impact in ascertaining whether the elections are free and fair. Two recent cases of missions dispatched by the *Commonwealth* (158) on invitation of a host country are fine examples. The Lancaster House Agreement provided for Commonwealth election observation in Zimbabwe/Rhodesia to ensure the opposition leaders Nkomo and Mugabe of the fairness of the election process. And in Uganda, the Commonwealth observers discussed problems relating to voter registration and nomination of candidates with the electoral authorities to an extent that the latter protested against this as an attempt to usurp the role of election supervisors (159).

(iii) Official country delegations

61. *Embassies* traditionally follow the daily political developments in the receiving State, evaluate these developments and report them to the sending State. With regard to the electoral process, their main concern lies in the reporting of the outcome of the elections and its consequences on the inter-state relations rather than in its fairness. The reports are confidential and go only to the proper authorities (160). Within those limits, they provide the governments of other States with a picture of the events. Since embassy personnel are already accredited, they need not have any special permission to travel around and observe the campaigning or the election day occurrences.

62. It is also possible for a State to send a *special mission* to monitor the elections. Such missions would not be organized usually but with an invitation of the host State (161). Since regular relations between States and the establishment of permanent missions takes place only by mutual consent (162) and can at any time be broken off (163), consent is *a fortiori* required for *ad hoc* missions (164). Activities of *ad hoc* country missions may

(158) Observers serve as the representative of the Commonwealth and missions have been organized to U.K. controlled territories or former colonies : Malta, Gibraltar, British Guinea, Uganda, Zimbabwe, Mauritius.

(159) GARBER, L., *Working paper, Conference on monitoring foreign elections* (May 20 to May 22, 1984), International Human Rights Law Group, Washington, 8 (on file with the I.H.R.L.G.).

(160) With an example of a remarkable exception : the yearly issuance by the U.S. Department of State under Sec. 116 (d) of the Foreign Assistance Act of 1961, as amended, of reports on the human rights practice in all countries (except for the U.S.), using as a source reports from U.S. embassies abroad.

(161) This in default of the realisation of the U.N. principles in article 1 §§ 2-3 of the Charter which call for amical co-operation between States.

(162) Vienna Convention on Diplomatic Relations, art. 2.

(163) Cf. Vienna Convention on Diplomatic Relations, art. 45.

(164) See the four general principles in the Special Missions document of the U.N. Secretariat, UN Doc A/CN.4/155 : (i) consent, (ii) right to privileges and immunities, (iii) no precedence *ex proprio vigore* on permanent missions and (iv) termination of mission when objective is reached. See also WATERS, M., *The* ad hoc *diplomat : a study in municipal and international law*, Martinus Nyhoff, The Hague, 1963, 112-155 ; PRZETACNIK, Diplomacy by Special Missions, 59 *Revue de Droit International de Sciences Diplomatiques* 109-176 (1981).

vary (165) from a summary analysis of the technical aspects of the voting process to a comprehensive evaluation, as their presence may have a primary purpose to show support for the regime or for the electoral process or to give an objective assessment of its validity.

(iv) Nongovernmental organizations

63. The domestic jurisdiction is only protected against direct or indirect interference by a State or an (intergovernmental) international organization (166). Since nongovernmental organizations lack coercive authority, they have no capacity to interfere in internal affairs of a State and are as such not subject to the sovereignty objections, although governmental co-operation is naturally preferable : observers from NGO missions are always subject to possible denial of entry.

64. Reasons for which NGOs may want to monitor foreign elections are for instance (i) a general interest in developments in a particular country, (ii) the request of a fraternal organization in that country, (iii) to evaluate the general human rights and political situation in the host country, (iv) to provide a credible counter to likely conclusions of other delegations (167). Even when invited by the government their aspiration can only be to observe the process and not to give any supervision (168). NGO presence therefore should not be abused by the host country as a sign of support.

(v) Domestic observers

65. Party officials of majority and minority should be allowed to observe the election process. Such officials are the most interested party to attest to the sincerity of the process on election day if they can lodge any complaints for irregularities which may occur. However, that role is also limited to the extent of their self-interest. These observers work within the framework of the political system and may not be willing to challenge provisions that advantage them or disadvantage adversaries, as for instance restrictions to other parties. Presence of official party observers may not, therefore, be a reason to deny an international team to assess the entire electoral process.

(vi) Press

66. The mere presence of both national and international press reporters may have an effect on the circumstances in which the elections are held,

(165) GARBER, L., *Guidelines*, 3-4.

(166) ERMACORA, F., « *Enquiry Commissions* », 206 ; WEISSBRODT, D., *o.c.*, 50.

(167) GARBER, L., *Guidelines*, 4. In general, see WISEBERG, L. S. and SCOBLE, H. M., Monitoring Human Rights Violations : the Role of Nongovernmental Organizations, in KOMMERS, D. P. and LOESCHER, G. D. (ed.), *Human rights and Foreign Policy*, Univ. of Notre Dame Press, Notre Dame, 1979, 179-210.

(168) Article 44 of the American Convention provides that NGOs may lodge petitions with the Interamerican Commission.

deterring or at least detecting coercion and manipulation. Press reports of the rallies, political programs and events occurring on and around election day, and any other investigative journalism fulfill the function of reporting on the fairness to the international community or exposing human rights violations.

Duties of the host country

67. Formal accreditation bestows even on a special mission all privileges and immunities that regular diplomatic missions enjoy. However, special observation missions, whether created by an intergovernmental organization, a foreign country or a private organization, are in principle not accredited to a receiving State. The members of such a mission are not diplomats in the strict sense of the term. To determine a State's duty as host country, may analogies be drawn from customary international law (169)? Those customary rules apply to established bilateral relations between two countries, while observer teams may come from intergovernmental or nongovernmental organizations and have in all cases only *ad hoc* status and a special task, limited in time and purpose (170). It is important also to distinguish between those missions which a government has invited of its own initiative and other missions which are present in the country on their solicitation but accepted by the government and, thirdly, missions that are tolerated by the State but without any formal approval.

68. The United Nations and other international organizations never send missions without at least formal consent of the Host. The United Nations enjoys in the territority of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes (171). Representatives of the Members of the United Nations and officials of the Organization similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the Organization (172). Since the U.N. observer missions are created by resolution of the Organization, its members enjoy those « necessary privileges and immunities ». The mandate or terms of reference of those commissions as they are set out in the resolution creating the mission is the basis to derive these necessary facilities from. Members of U.N. observation missions also fall within the protection provided for by the 1946 General Convention on Privileges and Immunities of the United Nations and the corresponding 1947 Convention relating to the specialized agencies.

(169) Privileges and immunities accorded by customary international law in bilateral relations were codified in the Vienna Convention on Diplomatic Relations, 18 April 1961.

(170) See, in general, PRZETACNIK, *o.c.*; WOLF, J., « Die völkerrechtlichen Immunität des *ad hoc*-Diplomaten », 10 *EuGRZ* 401 (1983).

(171) Art. 105 (1) UN Charter.

(172) Art. 105 (2) UN Charter.

69. The Civil Covenant explicitly provides that members of the U.N. Human Rights Committee and of *ad hoc* conciliation commissions appointed under the Civil Covenant are entitled to the facilities, privileges and immunities of experts on mission for the United Nations as laid down in those Convention (173).

70. Experts on mission for the United Nations are entitled to immunity from personal arrest and seizure of personal baggage, immunity of legal process in respect of acts done and words spoken in performance of their functions, inviolability of their papers and documents, and facilities in respect of currency and exchange restrictions and of personal baggage (174). The host country can additionally grant full diplomatic immunities.

71. Basic principles regarding election observer missions from Intergovernmental Organizations may further be detected from the U.N. and Interamerican experience with on site visits (175) : freedom of investigation, freedom to determine itinerary and methods of operation (interviews, access to pertinent documents), freedom of movement throughout the country, guarantee of safety and security as well as privacy and security of premises, possessions and records, independence of premises and accommodations, privacy of interviews and hearings and protection of witnesses, in some cases full diplomatic privileges and immunities, freedom to keep records of activities, freedom to issue press communiqués. The expenses of the missions (176) are born by the IGO in question, although some countries have paid for travel and accommodation of O.A.S. missions.

72. It is our view that any mission, even NGO-observers who lack any diplomatic element as they cannot represent a sovereign State, must be granted minimal privileges and immunities by virtue of the fact that they are sent and received for official purposes, once they have notified the host State their status and function (*ne impediatur legatio*) (177). To construct a *de minimis* list — a host State may always grant extra privileges — a functionality test should be applied. Observation teams should enjoy all such guarantees, facilities, privileges and immunities as they may need for the free and undisturbed discharge of their mission and without which a mission of that kind cannot be accomplished in a normal way (178) :

(173) Art. 43 Civil Covenant.

(174) Art. VI General Convention on Privileges and Immunities of the United Nations.

(175) RAMCHARAN, B. G., *o.c.*, 140-141 and 176-179.

(176) With exception to expenses regarding security measures.

(177) WILSON, C. E., *Diplomatic privileges and immunities*, University of Arizona Press, Tucson, 1967, 17-25 ; WOLF, J., *o.c.*, 403-404. *Contra* : RYAN, M. H., « The Status of Agents on Special Mission in customary international law », (1978) 16 *Can.Yb.I.L.*, 157-196 detects a more rigid construction of the entitles categoried but is nevertheless *de lege ferenda* inclined to a functional approach.

(178) Cf. Convention on Diplomatic Relations and BARTOS, M., « Le statut des missions spéciales de la diplomatie *ad hoc* », *Recueil des Cours*, 1968, I, 542-552.

— Adequate lodgings.

— Inviolability of the premises of the mission, even if they are in a hotel.

— Inviolability of the records, archives and other documents, wherever they may be.

— General facilities for the performance of the functions of the mission.

— Domestic limitations of national security or « ordre public » may render visits to certain areas avoidable. Freedom of movement does not even apply necessarily to all *ad hoc* diplomatic missions. Since it is a function of an election observer mission, to give special attention to the electoral process in problem areas, it may be necessary for the team to visit zones which are generally prohibited to permanent diplomatic missions (179), for example military zones or along the border, if elections go on there. This freedom may conflict with the duty of a State to protect the safety and security of the mission.

— Freedom of communication.

— Inviolability of the members of the mission and the possessions they may need for the performance of their task (books, transportation means, personal luggage).

— Immunity from jurisdiction in general, but restricted to functional immunity (e.g. an election observer may not be asked to testify).

— Exemptions from social security and tax legislation.

In view of what is said about election observation as a customary rule (180) these functional immunities will arguably be extended if only out of comity or as a matter of « *courtoisie internationale* » to all observer teams, including those in whose arrival a State acquisces only reluctantly.

73. Other duties of the Host are to guarantee the safety and security of the mission and to provide the members with the necessary identification documents stipulating whatever may be necessary to enable them to carry out their function in accordance with these listed freedoms. The team has the duty to respect the legislation of the host State insofar it is in comformity with international law, to limit its activities to its mandate (terms of reference) and not to abuse the mission for other ends. The mission terminates when the objective is reached. The members should not prolong their stay unreasonably after the election period.

74. Both the protection of the impartiality of the mission and the promotion of the willingness of a government to collaborate with the observation team compells the organizator of the mission to be mindful of some other restrictions (181) : as to the composition of the mission, observers

(179) Representatives to the United Nations are granted freedom of movement only in New York and Washington for example, which is also an application of the functionality test : performance of task in New York and contact with embassy in Washington.

(180) Par. 44-53.

(181) Ermacora, F., « *Enquiry Commissions* », 205 ; Franck, T. M. and Fairley, H. S.,

should be qualified, impartial and prestigious, independent and integer. In particular situations, some persons who would otherwise be qualified may be advised not to function in a mission (182). Impartiality must also be maintained in the terms of reference (183) and the rules of procedure. Observance of these duties is contingent upon the duty of the State to co-operate.

ELECTION OBSERVATION AND PROMOTION OF HUMAN RIGHTS

75. The prime task of an observer mission is to assess the elections. Its criterium is the right to political participation. Observers review whether that right, as we have described it, is present in the legislation of the country (review of electoral laws : they may not weaken the principles of the elections) and in the administrative arrangements at hand (for example excessive deposit fees, provisions for disqualifications of political opponents). If the freedoms and rights are protected in theory, they must ascertain whether they are also provided for in practice. That is why missions have to enter the country, travel freely around and be able to speak with party officials, candidates, representatives from the main streams of society : magistrature, universities, churches, local leaders, business and worker groups and all other institutional organizations. They also have to be present to ascertain the impartial conduct of the electoral process (officials impartiality, protection of ballots or even voters in unruly areas, construction of voting booths, reporting of results). These tasks reveal legal and factual elements.

76. An observer is not just an independent reporter. His goal is the implementation of human rights. An observer is a partisan of free elections. Being committed to the promotion of human rights he cannot afford to be neutral (although he has to be objective, i.e., free of commitment to a preconceived outcome). The international attention bears on the attitude of both participants of an election : the government and the electors. Presence of an election observer team in the country has an influence on the government for greater respect of human rights, and will deter violations, intimidations, manipulations. The team may also have an influence on the overall human rights situation in a country. Where they review the electoral system they may accuse arbitrary arrests or detention, for instance, but also unrelated violations may come to light through the meetings or travels

« Procedural due process in human rights fact-finding by international agencies », 74 *A.J.I.L.* 313-317 (1980) ; RAMCHARAN, B. G., *o.c.*, 58.

(182) For example a *persona non grata*, persons with qualities unrelated to the task of election monitoring but which are repugnant to the particular country and can endanger the performance of the mission (for example religious beliefs).

(183) No conclusory language which would interfere with the integrity of the mission.

of the team. The team has an effect on the electors, awares them of the importance of free and fair elections, assures them of the concern of the world community in that regard and encourages them to participate. Lastly, their report gives the international community an insight in the expression of the will of the people and in the human rights situation of a specific country.